Item SP06-10 Response Form

Title: **Title 8. Appellate Rules** (adopt rules 8.1, 8.4, 8.7, 8.16, 8.40, 8.44, 8.60, 8.68, 8.150, 8.153, and 8.970 of the California Rules of Court; amend and renumber rules 1–80, 976–979 (see tables); repeal rules 40.2, 51, and 53(b).)

☐ **Agree** with proposed changes

☐ **Agree** with proposed changes **if modified**

☐ **Do not agree** with proposed changes

Comments: _____

_____

_____

_____

_____

Name: _____ **Title:** _____

Organization: _____

☐ **Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

Please **write** or **fax** or **respond using the Internet** to:

Address: Ms. Romunda Price,
Judicial Council, 455 Golden Gate Avenue,
San Francisco, CA 94102
Fax: (415) 865-7664 Attention: Romunda Price
Internet: www.courtinfo.ca.gov/invitationstocomment

DEADLINE FOR COMMENT: 5:00 p.m., Friday, March 3, 2006

Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee
All comments will become part of the public record of the council's action.

Invitation to Comment (SP06-10)

Title	**Title 8. Appellate Rules** (adopt rules 8.1, 8.4, 8.7, 8.16, 8.40, 8.44, 8.60, 8.68, 8.150, 8.153, and 8.970 of the California Rules of Court; amend and renumber rules 1–80, 976–979 (see tables); repeal rules 40.2, 51, and 53(b).)
Summary	Title 8 would contain the Appellate Rules (former Title 1) reorganized into a logical order and renumbered. Three new rules would be added to fill gaps; four existing rules would be divided into eight shorter rules for purposes of clarity; and three existing rules would be deleted as redundant. Many of the Advisory Committee Comments on the existing appellate rules would be simplified and the remainder would be deleted. No substantive changes would be made.
Source	Office of the General Counsel Administrative Office of the Courts
Staff	Patrick O'Donnell, Senior Attorney, 415-865-7665, patrick.o'donnell@jud.ca.gov Heather Anderson, Counsel, Appellate Advisory Committee, 415-865-7691, heather.anderson@jud.ca.gov
Discussion	Title 8 would contain the Appellate Rules (former Title 1). Division 1 would contain the rules relating to the Supreme Court and the Court of Appeal. Chapter 1 (rules 8.1–8.68) would contain the general provisions applicable to most appeals, including the rules on service and filing, substitution of parties and attorneys, form and number of filed documents, applications, motions, and extensions of time. Articles 1 and 2 of chapter 2 (rules 8.100–8.163) would contain the rules on civil appeals, including the rules on the contents of and time to file the notice of appeal, petition for writ of supersedeas, the clerk's and reporter's transcripts and their substitutes, form of the record, sanctions for failure to procure the record, augmenting and correcting the record, and sealed records. Article 3 of chapter 2 (8.200–8.224) would contain the rules on preparing, serving, and filing briefs in the Court of Appeal, including the rules on their contents and form, sanctions for failure to timely file, and transmitting exhibits to the reviewing court. Article 4 of chapter 2 (rules 8.240–8.276) would contain the rules on

hearing and decision in the Court of Appeal, including the rules on calendar preference, settlement and voluntary dismissal of appeals, prehearing conferences, judicial notice, oral argument and submission, finality and modification of decisions, rehearing, remittitur, and costs and sanctions.

Article 5 of chapter 2 (rules 8.300–8.352) would contain the rules on hearing and decision in the Supreme Court, including the rules on petition for review and petition to exhaust state remedies, form and contents of petition, answer, and reply, issues on review, parties' briefs on the merits and amici curiae briefs, oral argument and submission, forms of disposition, finality and modification of decisions, rehearing, remittitur, and costs and sanctions.

Chapter 3 would contain the rules on criminal appeals. Article 1 (rules 8.400–8.416) would include the rules on appointment of appellate counsel, the contents of and time to file the notice of appeal, and stay of execution and bail.

Article 2 of chapter 3 (rules 8.420–8.446) would contain the rules on the record in criminal appeals, including the rules on contents of the normal record, sealed records, preparing and sending the record, and augmenting or correcting the record in the reviewing court. Article 3 of chapter 3 (rules 8.460–8.468) would contain the rules on briefs, hearing, and decision in the Court of Appeal and the Supreme Court.

Chapter 4 would contain the rules on appeals from judgments of death. Article 1 (rules 8.500–8.505) would contain the rule on the qualifications of court-appointed counsel in death penalty appeals and habeas corpus proceedings.

Article 2 of chapter 4 (rules 8.510–8.525) would contain the rules on the record in death penalty appeals, including the rules on the contents and form of the record, preparing and certifying the record in pretrial proceedings, and preparing and certifying the trial record for completeness and accuracy.

Article 3 of chapter 4 (rules 8.530–8.542) would include the rules on briefs, transmitting exhibits, oral argument, and the filing and finality of decisions.

Chapter 5 (rules 8.550–8.555) would contain the rules on appeals and

writs in habeas corpus cases.

Chapter 6 would contain the rules on appeals and writs in juvenile cases. Article 1 (8.600–8.616) would contain the rules on appeals, including the rules on the contents of and time to file the notice of appeal, contents and form of the record, preparing, sending, and correcting the record, briefs, and appeals from termination of parental rights.

Article 2 of chapter 6 (rules 8.650–8.656) would contain the rules on writs to review certain statutory orders in juvenile cases, including orders setting a hearing under Welfare and Institutions Code section 366.26. Article 3 (rules 8.670–8.674) would contain the rules on hearing and decision of appeals and writs.

Chapter 7 (rules 8.680–8.682) would contain the rules on miscellaneous appeals relating to conservatorships.

Chapter 8 (rules 8.700–8.708) would contain the rules on writs of mandate, certiorari, and prohibition, and writs to review decisions of statewide administrative agencies such as the Workers' Compensation Appeals Board and the California Public Utilities Commission.

Chapter 9 (rules 8.750–8.773) would contain the rules on transfer of superior court appellate division cases to the Court of Appeal.

Division 2 would be reserved for the rules relating to appeals to the superior court appellate division, which will circulate separately for public comment.

Division 3 (rules 8.950–8.966) would contain the rules on review of small claims cases by trial de novo in the superior court.

Division 4 (rules 8.970–8.995) would contain the rules on publication of appellate opinions.

Attachments

DRAFT 10

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Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 1. General Provisions

Article 1. In General

Rule 8.1. Title

The rules in this title may be referred to as the Appellate Rules. All references in this title to "these rules" mean the Appellate Rules.

Rule 8.4. ~~53.~~ Application of division ~~and construction of rules~~

~~**(a) Application**~~

The rules in ~~title 1~~ this division apply to:

(1) Appeals from the superior courts, except appeals to the appellate divisions of the superior courts;

(2) Original proceedings, motions, applications, and petitions in the Courts of Appeal and Supreme Court; and

(3) Proceedings for transferring cases within the appellate jurisdiction of the superior court to the Court of Appeal for review, unless rules ~~61–69~~ 8.750–8.773 provide otherwise.

~~**(b) Construction**~~

~~These rules must be liberally construed to ensure the just and speedy determination of the proceedings they govern.~~

~~**(c) Amendments to statutes**~~

~~In these rules a reference to a statute includes any subsequent amendments to the statute.~~

~~**Advisory Committee Comment**~~

~~**Subdivision (c).** Revised rule 53(c) fills a gap. It is derived from Evidence Code section 6.~~

(Reviser's note: Former rule 53(b) has been superseded by rule 8.7. Former rule 53(c) is now rule 8.16.)

Rule 8.7. Construction

The rules of construction stated in rule 1.5 apply to these rules. In addition, in these rules the headings of divisions, chapters, articles, rules, and subdivisions are substantive.

Rule 8.10. ~~40.~~ Definitions and use of terms

Unless the context or subject matter requires otherwise, the ~~following~~ definitions and use of terms in rule 1.6 apply to ~~Title 1 of~~ these rules. In addition, the following apply:

~~(a) Appellant, respondent, and party~~

(1) "Appellant" means the appealing party~~;~~.

(2) "Respondent" means the adverse party.

~~(2)~~(3) "Party" includes any attorney of record for that party.

~~(b) Gender, tense, and number~~

~~Each gender (masculine, feminine, or neuter) includes the others; each tense (past, present, or future) includes the others; each number (singular or plural) includes the other.~~

~~(c) Judgment~~

(4) "Judgment" includes any judgment or order that may be appealed.

~~(d) Must, may, and may not; should; will~~

~~(1) "Must" is mandatory; "may" is permissive; "may not" means "is not permitted to."~~

~~(2) "Should" expresses a preference or a nonbinding recommendation.~~

~~(3) "Will" expresses a future contingency or predicts action by a court or a judicial officer.~~

~~(e) Superior and reviewing courts~~

~~(1)~~(5) "Superior court" means the court from which an appeal is taken.

~~(2)~~(6) "Reviewing court" means the Supreme Court or the Court of Appeal to which an appeal is taken, in which an original proceeding is begun, or to which an appeal or original proceeding is transferred.

(7) The word "briefs" includes petitions for rehearing, petitions for review, and answers thereto. It does not include petitions for extraordinary relief in original proceedings.

~~**Advisory Committee Comment**~~

~~Former rule 40(f), (i), and (k) and the second sentence of former rule 40(e) have been moved to new rule 40.1 on service and filing.~~

~~Former rule 40(j) defined "register" and "register of actions" to mean the permanent record of cases maintained by electronic, magnetic, microphotographic, or similar means. The topic is covered more fully in rule 70.~~

~~Former rule 40(l) has been moved to new rule 40.2 on recycled paper.~~

~~Former rule 40(h) has been deleted as unnecessary.~~

~~**Subdivision (d).** Former rule 40(d) defined the word "shall" as mandatory; revised rule 40(d)(1) instead defines the word "must" as mandatory. Effective January 1, 2001, the latter usage was adopted by both the Judicial Council and its Rules and Projects Committee for all new and all amended California Rules of Court. (See Judicial Council of Cal., mins. (Oct. 27, 2000) p. 30; Judicial Council of Cal., Rules and Projects Com., *Policies and Guidelines for Rules, Forms, and Standards* (Dec. 17, 2001) p. 3.~~

Rule 8.13. ~~54.~~ Amendments to rules

Only the Judicial Council may amend these rules~~.~~, except the rules in division 4 which may be amended only by the Supreme Court. An amendment by the Judicial Council must be published in the advance pamphlets of the Official Reports and takes effect on the date ordered by the Judicial Council.

~~**Advisory Committee Comment (2005)**~~

~~Former rule 54 stated that an amendment to these rules took effect 60 days after its first publication unless the Judicial Council ordered otherwise. That practice is no longer followed; currently, the Judicial Council specifies the effective date of an amendment in the order of the Council adopting it. Revised rule 54 reflects this practice.~~

~~Former rule 54 provided for the *withdrawal* of a rule amendment by the Judicial Council before its effective date. Revised rule 54 deletes this provision as obsolete: the council neither uses nor needs the~~

~~procedure. The council retains the authority to repeal or modify a pending amendment at any time. The change is not substantive.~~

Rule 8.16. Amendments to statutes

In these rules, a reference to a statute includes any subsequent amendment to the statute.

(Reviser's note: Rule 8.16 is derived from former rule 53(c).)

Rule 8.18. ~~46.~~ Documents violating rules not to be filed

Except as these rules provide otherwise, the reviewing court clerk must not file any record, brief, or other document that does not conform to these rules.

Advisory Committee Comment [revised version]

The proviso acknowledges there are exceptions to this rule (e.g., rules 8.220(a) and 8.700(d)(2)).

Advisory Committee Comment ~~(2005)~~ [version showing revisions]

~~Revised rule 46 adds a~~The proviso ~~noting~~ acknowledges there are exceptions to this rule (e.g., rules ~~17~~ 8.220(a) and ~~revised rule 56~~ 8.700(d)(2)).

Rule 8.20. ~~46.5.~~ Sanctions to compel compliance

The failure of a court reporter or clerk to perform any duty imposed by statute or these rules that delays the filing of the appellate record is an unlawful interference with the reviewing court's proceedings. It may be treated as an interference in addition to or instead of any other sanction that may be imposed by law for the same breach of duty. This rule does not limit the reviewing court's power to define and remedy any other interference with its proceedings.

Rule 8.23. ~~80.~~ Local rules of Courts of Appeal

(a) California Rules of Court prevail

A Court of Appeal must accept for filing a record, brief, or other document that complies with the California Rules of Court despite any local rule imposing other requirements.

(b) Publication

(1) A Court of Appeal must submit any local rule it adopts to the Reporter of Decisions for publication in the advance pamphlets of the Official Reports.

(2) As used in this rule, "publication" means printing in the manner in which amendments to the California Rules of Court are printed.

(c) Effective date

A local rule cannot take effect sooner than 45 days after the publication date of the advance pamphlet in which it is printed.

Article 2. Service, Filing, Form, and Number of Documents

Rule 8.25. ~~40.1.~~ Service and filing

(a) Service

(1) Before filing any document in a court, a party must serve, by any method permitted by the Code of Civil Procedure, one copy of the document on the attorney for each party separately represented, on each unrepresented party, and on any other person or entity when required by statute or rule.

(2) The party must attach a proof of service to the document presented for filing. The proof must name each party represented by each attorney served.

(b) Filing

(1) ~~Except as provided in rule 46,~~ A document is deemed filed on the date the clerk receives it.

(2) Except as provided in (3), a filing is not timely unless the clerk receives the document before the time to file it expires.

(3) A brief, a petition for rehearing, an answer to a petition for rehearing, a petition for review, an answer to a petition for review, or a reply to an answer to a petition for review is timely if the time to file it has not expired on the date of:

(A) Its mailing by priority or express mail as shown on the postmark or the postal receipt~~,~~; or

(B) Its delivery to a common carrier promising overnight delivery as shown on the carrier's receipt.

(4) The provisions of (3) do not apply to original proceedings.

Advisory Committee Comment [revised version]

Subdivision (a). Subdivision (a)(1) requires service "by any method permitted by the Code of Civil Procedure." The reference is to the several permissible methods of service provided in Code of Civil Procedure sections 1010–1020.

Advisory Committee Comment ~~(2005)~~ [version showing revisions]

~~New rule 40.1 restates provisions of former rule 40(e), (f), (i), and (k) on the subject of serving and filing documents in the superior courts and reviewing courts.~~

Subdivision (a). ~~Former rule 40(f) required service "in a manner permitted by law"; new rule 40.1~~ Subdivision (a)(1) requires ~~, more specifically,~~ service "by any method permitted by the Code of Civil Procedure." The reference is to the several permissible methods of service provided in Code of Civil Procedure sections 1010–1020.

Rule 8.29. ~~44.5.~~ Service on nonparty public officer or agency

~~(a) Service on the Attorney General~~

~~In addition to any statutory requirements for service of briefs on public officers or agencies, a party must serve its brief or petition on the Attorney General if the brief or petition:~~

~~(1) questions the constitutionality of a state statute; or~~

~~(2) is filed on behalf of the State of California, a county, or an officer whom the Attorney General may lawfully represent in:~~

~~(A) a criminal case;~~

~~(B) a case in which the state or a state officer in his or her official capacity is a party; or~~

~~(C) a case in which a county is a party, unless the county's interest conflicts with that of the state or a state officer in his or her official capacity.~~

~~(b)~~ (a) Proof of service

When a statute or this rule requires a party to serve any document on a nonparty public officer or agency, the party must file proof of such service with the document unless a statute permits service after the document is filed, in which case the proof of service must be filed immediately after the document is served on the public officer or agency.

~~(c)~~ (b) Identification on cover

When a statute or this rule requires a party to serve any document on a nonparty public officer or agency, the cover of the document must contain a statement that identifies the statute or rule requiring service of the document on the public officer or agency in substantially the following form: "Service on [insert name of the officer or agency] required by [insert citation to the statute or rule]."

(c) Service on the Attorney General

In addition to any statutory requirements for service of briefs on public officers or agencies, a party must serve its brief or petition on the Attorney General if the brief or petition:

(1) Questions the constitutionality of a state statute; or

(2) Is filed on behalf of the State of California, a county, or an officer whom the Attorney General may lawfully represent in:

(A) A criminal case;

(B) A case in which the state or a state officer in his or her official capacity is a party; or

(C) A case in which a county is a party, unless the county's interest conflicts with that of the state or a state officer in his or her official capacity.

Advisory Committee Comment [revised version]

Rule 8.29 refers to statutes that require a party to serve documents on a nonparty public officer or agency. For a list of such statutory requirements, please see the *Civil Case Information Statement* (form APP-004).

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

Rule ~~44.5~~ 8.29 refers to statutes that require a party to serve documents on a nonparty public officer or agency. For a list of examples of such statutory requirements, please see ~~Judicial Council form APP-004,~~ the *Civil Case Information Statement* (form APP-004).

Rule 8.32. ~~40.5.~~ Notice of change of address or telephone number

(a) Serving and filing notice

(1) An attorney or unrepresented party whose address or telephone number changes while a case is pending in a reviewing court must promptly serve and file in that court a written notice of the change.

(2) The notice must specify the title and number of the case or cases to which it applies. If an attorney gives the notice, the notice must include the attorney's California State Bar number.

(b) Matters affected by notice

Unless the person giving the notice advises the reviewing court clerk otherwise in writing, the clerk may use the new address or telephone number in all pending and concluded cases.

(c) Appearance not conforming to address of record; multiple offices

(1) The clerk must enter a proposed appearance in a new matter even if it shows an attorney's address different from the address of record; but the appearance is subject to being struck if, after inquiry by the court, the attorney does not promptly confirm the address or serve and file a change of address.

(2) Attorneys with two or more offices may have a corresponding number of addresses of record, but only one address may be associated with a given case.

~~**Advisory Committee Comment (2005)**~~

~~**Subdivision (a).** Former rule 40.5(a) required that a notice of change of address or telephone number specify the number of the case to which it applied. Filling a gap, revised rule 40.5(a) requires that the notice also specify the case title.~~

~~**Subdivision (b).** Former rule 40.5(b) was limited on its face to notices filed by attorneys. Filling a gap, revised rule 40.5(b) includes notices filed by unrepresented parties.~~

Rule 8.36. ~~48.~~ Substituting parties; substituting or withdrawing attorneys

(a) Substituting parties

Substitution of parties in an appeal or original proceeding must be made by serving and filing a motion in the reviewing court. The clerk of that court must notify the superior court of any ruling on the motion.

(b) Substituting attorneys

A party may substitute attorneys by serving and filing in the reviewing court a substitution signed by the party represented and the new attorney. In all appeals and in original proceedings related to a superior court proceeding, the party must also serve the superior court.

(c) Withdrawing attorney

(1) An attorney may request withdrawal by filing a motion to withdraw. Unless the court orders otherwise, the motion need be served only on the party represented and the attorneys directly affected.

(2) The proof of service need not include the address of the party represented. But if the court grants the motion, the withdrawing attorney must promptly provide the court and the opposing party with the party's current or last known address and telephone number.

(3) In all appeals and in original proceedings related to a superior court proceeding, the reviewing court clerk must notify the superior court of any ruling on the motion.

(4) If the motion is filed in any proceeding pending in the Supreme Court after grant of review, the Supreme Court clerk must also notify the Court of Appeal of any ruling on the motion.

~~**Advisory Committee Comment (2005)**~~

~~**Subdivision (a).** Revised rule 48(a) simplifies and restates former rule 48(a) to conform to good practice. No substantive change is intended.~~

~~**Subdivision (b).** Former rule 48(b) required a party substituting attorneys to serve and file either a stipulation or a motion in the reviewing court. In practice, however, a party does so by serving and filing a *substitution*. Revised rule 48(b) conforms to that practice. The change is not substantive.~~

~~Former rule 48(b) required the substitution to be signed by the party, the former attorney, and the new attorney. In practice, however, the former attorney's consent is not required because that attorney does not have authority to prevent the substitution. In a substantive change intended to conform to practice and to a reasonable reading of the governing statute (Code Civ. Proc., § 284, subd. 1), revised rule 48(b) requires only the party represented and the new attorney to sign the substitution.~~

~~Former rule 48(b) required the new attorney, following a substitution, to "give notice thereof to all parties." Because such a notice would duplicate the requirement of revised rule 48(b) that the substitution be *served*, it is deleted.~~

~~**Subdivision (c).** Former rule 48(b) required an attorney wishing to withdraw to serve and file either a stipulation or a motion in the reviewing court. In practice, however, an attorney withdraws by filing a motion with proof of service on the party represented and the attorneys directly affected. Revised rule 48(c)(1) conforms to that practice, but the change is not substantive. To protect privacy, revised rule 48(c)(2) provides that the proof of service of the motion need not include the address of the party represented; but if the motion is granted, the withdrawing attorney must promptly provide the court and the opposing party with the party's current or last known address and telephone number.~~

~~Filling a gap, revised rule 48(c)(4) provides that if a motion to withdraw is filed in any proceeding — whether an appeal or an original proceeding in the Court of Appeal — pending in the Supreme Court after grant of review, the Supreme Court clerk must also notify the Court of Appeal of any ruling on the motion.~~

Rule 8.40. ~~44.~~ Form~~, number, and cover of documents filed in the reviewing court~~ of filed documents

(a) Form

Except as these rules provide otherwise, documents filed in a reviewing court may be either produced on a computer or typewritten and must comply with the relevant provisions of rule ~~14~~ 8.204(b).

~~(b) Number of copies~~

~~Except as these rules provide otherwise, the following number of copies must be filed of every brief, petition, motion, or other document, except the record, filed in a reviewing court:~~

~~(1) If filed in the Supreme Court:~~

~~(A) Except as provided in (D), an original and 13 copies of a petition for review, an answer, a reply, a brief on the merits, an amicus curiae brief, an answer to an amicus curiae brief, a petition for rehearing, or an answer to a petition for rehearing;~~

~~(B) Unless the court orders otherwise, an original and 10 copies of a petition for a writ within the court's original jurisdiction, an opposition or other response to the petition, or a reply;~~

~~(C) Unless the court orders otherwise, an original and 2 copies of any supporting document accompanying a petition for writ of habeas corpus, an opposition or other response to the petition, or a reply;~~

~~(D) An original and 8 copies of a petition for review to exhaust state remedies under rule 33.3, an answer, or a reply, or an amicus curiae letter under rule 28(g);~~

~~(E) An original and 8 copies of a motion or an opposition or other response to a motion; and~~

~~(F) An original and 1 copy of an application, including an application to extend time, or any other document.~~

~~(2) If filed in a Court of Appeal:~~

~~(A) An original and 4 copies of a brief, an amicus curiae brief, or an answer to an amicus curiae brief, and, in civil appeals, proof of delivery of 4 copies to the Supreme Court;~~

~~(B) An original petition for writ of habeas corpus filed under rule 60 by a person not represented by an attorney and 1 set of any supporting documents;~~

~~(C) An original and 4 copies of any other petition, an answer, opposition or other response to a petition, or a reply;~~

~~(D) An original and 3 copies of a motion or an opposition or other response to a motion;~~

~~(E) Unless the court orders otherwise by local rule on in the specific case, 1 set of any separately bound supporting documents;~~

~~(F) An original and 1 copy of any application other than an application to extend time, or any other document; and~~

~~(G) An original and 1 copy of an application to extend time. In addition, 1 copy for each separately represented or unrepresented party must be provided for the court.~~

~~(c)~~(b) Cover color

(1) As far as practicable, the covers of briefs and petitions must be in the following colors:

Appellant's opening brief or appendix ..... green
Respondent's brief or appendix ..... yellow

Appellant's reply brief or appendix ..... tan
Joint appendix ..... white
Amicus curiae brief ..... gray
Answer to amicus curiae brief ..... blue
Petition for rehearing ..... orange
Answer to petition for rehearing ..... blue
Petition for original writ ..... red
Answer (or opposition) to petition for original writ ..... red
Reply to answer (or opposition) to petition for original writ ..... red
Petition for review ..... white
Answer to petition for review ..... blue
Reply to answer to petition for review ..... white
Opening brief on the merits ..... white
Answer brief on the merits ..... blue
Reply brief on the merits ..... white

(2) In appeals under rule ~~16~~ 8.216, the cover of a combined respondent's brief and appellant's opening brief must be yellow, and the cover of a combined reply brief and respondent's brief must be tan.

(3) A brief or petition not conforming to (1) or (2) must be accepted for filing, but in case of repeated violations by an attorney or party the court may proceed as provided in rule ~~14~~ 8.204(e).

~~(d)~~(c) Cover information

The cover—or first page if there is no cover—of every document filed by an attorney in a reviewing court must comply with rule ~~14~~ 8.204(b)(10)(D).

~~**Advisory Committee Comment (2005)**~~

~~**Subdivision (a).** Former rule 44(a) required that all copies of documents be clear, legible, and on recycled paper, and encouraged the use of recycled paper for brief covers. Revised rule 44(a) deletes these requirements because they duplicate provisions of rule 14(b), incorporated by reference into the revised rule.~~

~~**Subdivision (b).** Revised rule 44(b)(1)(A) combines former rule 44(b)(1)(A) and (B). Filling gaps, revised rule 44(b)(1)(A) specifies that an amicus curiae brief, an answer to an amicus curiae brief, a petition for rehearing, and an answer to such a petition in the Supreme Court must be filed in an original and 13 copies.~~

~~Filling a gap, revised rule 44(b)(1)(B) specifies that a reply to an opposition to a writ petition in the Supreme Court must be filed in an original and 10 copies.~~

~~To conform to Supreme Court practice, revised rule 44(b)(1)(C) specifies that only an original and 2 copies of any supporting document or exhibit accompanying a petition for writ of habeas corpus, an opposition, or a reply must be filed unless the court orders otherwise.~~

~~Filling a gap, revised rule 44(b)(1)(D) specifies that an amicus curiae letter under rule 28(g) must be filed in an original and 8 copies.~~

~~Revised rule 44(b)(1)(F) and (2)(D) clarifies that only an original and one copy of "an application, including an application for extension of time," must be filed in either the Supreme Court or the Court of Appeal.~~

~~Former rule 44(b)(2)(ii) required a party filing a brief in the Court of Appeal in a civil case to attach proof of service of 5 copies on the Supreme Court. Revised rule 44(b)(2)(A) reduces that number from 5 to 4. If the Court of Appeal has ordered such briefs sealed, the party must comply with rule 15(c)(2) as amended effective January 1, 2005.~~

~~Filling a gap, revised rule 44(b)(2)(B) specifies that a reply to an opposition to a petition in the Court of Appeal must be filed in an original and 4 copies.~~

~~Revised rule 44(b)(3) is new. Like former rule 44(b)(2)(B) and (C), revised rule 44(b)(2)(B) and (C) requires that certain documents be filed in the Court of Appeal in an original and multiple copies. But the party may – and under certain rules, must – accompany such a filing with supporting documents, and in some cases those documents may be voluminous. To relieve the party of the burden of preparing – and the court of the burden of processing and storing – multiple copies of voluminous supporting documents, it is the practice of several Courts of Appeal to require only one set of any separately bound documents that a party files in support of a filing under rule 44(b)(2)(B) or (C). Revised rule 44(b)(3) reflects that practice, but recognizes that the courts may wish to order otherwise by local rule or in specific cases.~~

~~**Subdivision (c).** Filling gaps, revised rule 44(c) specifies the colors of the following additional documents: appellant's appendix (rule 5.1), respondent's appendix, joint appendix, answer to amicus curiae brief, and reply to answer (or opposition) to petition for original writ.~~

~~Filling a gap, revised rule 44(c)(2) specifies that in an appeal in which a party is both an appellant and a respondent, the cover of a combined respondent's brief and appellant's opening brief must be yellow, and the cover of a combined reply brief and respondent's brief must be tan.~~

(Reviser's note: former rule 44(b) has been moved to rule 8.44.)

Rule 8.44. Number of copies of filed documents

Except as these rules provide otherwise, the following number of copies must be filed of every brief, petition, motion, application, or other document, except the record, filed in a reviewing court:

(a) Documents filed in the Supreme Court

(1) Except as provided in (4), an original and 13 copies of a petition for review, an answer, a reply, a brief on the merits, an amicus curiae brief, an answer to

an amicus curiae brief, a petition for rehearing, or an answer to a petition for rehearing;

(2) Unless the court orders otherwise, an original and 10 copies of a petition for a writ within the court's original jurisdiction, an opposition or other response to the petition, or a reply;

(3) Unless the court orders otherwise, an original and 2 copies of any supporting document accompanying a petition for writ of habeas corpus, an opposition or other response to the petition, or a reply;

(4) An original and 8 copies of a petition for review to exhaust state remedies under rule 8.308, an answer, or a reply, or an amicus curiae letter under rule 8.300(g);

(5) An original and 8 copies of a motion or an opposition or other response to a motion; and

(6) An original and 1 copy of an application, including an application to extend time, or any other document.

(b) Documents filed in a Court of Appeal

(1) An original and 4 copies of a brief, an amicus curiae brief, or an answer to an amicus curiae brief, and, in civil appeals, proof of delivery of 4 copies to the Supreme Court;

(2) An original of a petition for writ of habeas corpus filed under rule 8.550 by a person who is not represented by an attorney and 1 set of any supporting documents;

(3) An original and 4 copies of any other petition, an answer, opposition or other response to a petition, or a reply;

(4) An original and 3 copies of a motion or an opposition or other response to a motion;

(5) Unless the court orders otherwise by local rule or in the specific case, 1 set of any separately bound supporting documents accompanying a document filed under (3) or (4);

(6) An original and 1 copy of an application, other than an application to extend time, or any other document; and

(7) An original and 1 copy of an application to extend time. In addition, 1 copy for each separately represented and unrepresented party must be provided to the court.

(Reviser's note: Rule 8.44 is derived from former rule 44(b).)

Article 3. Applications and Motions; Extending and Shortening Time

Rule 8.50. ~~43.~~ Applications ~~in the reviewing court~~

(a) Service and filing

Except as these rules provide otherwise, parties must serve and file all applications in the reviewing court, including applications to extend the time to file records, briefs, or other documents, and applications to shorten time. For good cause, the Chief Justice or presiding justice may excuse advance service.

(b) Contents

The application must state facts showing good cause—or exceptional good cause, when required by these rules—for granting the application and must identify any previous application filed by any party.

(c) Envelopes

An application to a Court of Appeal must be accompanied by addressed, postage-prepaid envelopes for the clerk's use in mailing copies of the order on the application to all parties.

(d) Disposition

Unless the court determines otherwise, the Chief Justice or presiding justice may rule on the application.

Advisory Committee Comment [revised version]

Rule 8.50 addresses applications generally. Rules 8.60 and 8.68 address applications to extend or shorten time.

Advisory Committee Comment ~~(2005)~~ [version showing revisions]

~~Revised rule 43~~Rule 8.50 addresses applications generally. ~~Revised rules 45 and 45.5~~Rules 8.60 and 8.68 address applications to extend or shorten time.

~~**Subdivision (a).** Former rule 43 provided that the Chief Justice or presiding justice "may require an additional showing to be made" to support an application to the reviewing court. This provision in effect duplicated the rule's subsequent provision requiring the application to state facts showing good cause for granting the application. Revised rule 43(a) deletes the provision for an "additional showing" but subdivision (b) retains the requirement of a showing of good cause. The change is not substantive.~~

~~**Subdivision (c).** Revised rule 43(c) limits the applicant's duty to provide addressed, postage-prepaid envelopes to filings in the Court of Appeal. The Supreme Court does not use such envelopes.~~

Rule 8.54. ~~41.~~ Motions ~~in the reviewing court~~

(a) Motion and opposition

(1) Except as these rules provide otherwise, a party wanting to make a motion in a reviewing court must serve and file a written motion stating the grounds and the relief requested and identifying any documents on which the motion is based.

(2) A motion must be accompanied by points and authorities and, if it is based on matters outside the record, by declarations or other supporting evidence.

(3) Any opposition must be served and filed within 15 days after the motion is filed.

(b) Disposition

(1) The court may rule on a motion at any time after an opposition or other response is filed or the time to oppose has expired.

(2) On a party's request or its own motion, the court may place a motion on calendar for a hearing. The clerk must promptly send each party a notice of the date and time of the hearing.

(c) Failure to oppose motion

A failure to oppose a motion may be deemed a consent to the granting of the motion.

Advisory Committee Comment [revised version]

Subdivision (c). Subdivision (c) provides that a "failure to oppose a motion" may be deemed a consent to the granting of the motion. The provision is not intended to indicate a position on the question whether there is an implied right to a hearing to oppose a motion to dismiss an appeal.

Advisory Committee Comment ~~(2005)~~ [version showing revisions]

~~**Subdivision (a).** Former rule 41(a) measured the time to file an opposition to a motion from the date the motion was *served;* revised rule 41(a)(3) instead measures that time from the date the motion is *filed*. In each case the revised rule allows five additional days for mailing. The principal reason for this substantive change is that the filing date of a document is more reliable than the date appearing on its proof of service. Using the filing date results in greater certainty for the reviewing court and makes it easier for the reviewing court clerk to verify the relevant date, both when the motion is filed and later when an opposition is presented for filing. The rule is thus made consistent with the rules providing that the filing date controls the time to prepare answers and replies to briefs and petitions (see, e.g, rules 15(a), 28(e), 29.1(a), 29.5(b), 33(c), and 36(c)).~~

~~**Subdivision (b).** Former rule 41(b) allowed a court to rule on a motion at any time after opposition was filed or the time to file an opposition had expired. In practice, however, a party often does not intend to oppose the motion and so notifies the court. Recognizing this practice, revised rule 41(b)(1) provides that the court may rule when an opposition "or other response," e.g., a statement of intent not to oppose, is filed.~~

~~Former rule 41(b) declared that a motion would be deemed made "on all the grounds stated therein." Revised rule 41 deletes this provision as superfluous.~~

Subdivision (c). ~~Former rule 41(c) separately stated the consequences of (1) failure "to appear and oppose [a motion to dismiss an appeal] after notification by the clerk of a hearing thereon" and (2) failure to oppose any other motion. Because the consequence was the same in either case—implied consent to the granting of the motion—revised rule 41(c) deletes the distinction and~~ Subdivision (c) provides ~~simply~~ that a "failure to oppose a motion" may be deemed a consent to the granting of the motion. The ~~change is not substantive, and~~ provision is not intended to indicate a position on the question whether there is an implied right to a hearing to oppose a motion to dismiss an appeal.

Rule 8.57. ~~42.~~ Motions before the record is filed

(a) Motion to dismiss appeal

A motion to dismiss an appeal before the record is filed in the reviewing court must be accompanied by a certificate of the superior court clerk, a declaration, or both, stating:

(1) The nature of the action and the relief sought by the complaint and any cross-complaint or complaint in intervention;

(2) The names, addresses, and telephone numbers of all attorneys of record—stating whom each represents—and unrepresented parties;

(3) A description of the judgment or order appealed from, its entry date, and the service date of any written notice of its entry;

(4) The factual basis of any extension of the time to appeal under rule ~~3~~ 8.108;

(5) The filing dates of all notices of appeal and the courts in which they were filed;

(6) The filing date of any document necessary to procure the record on appeal; and

(7) The status of the record preparation process, including any order extending time to prepare the record.

(b) Other motions

Any other motion filed before the record is filed in the reviewing court must be accompanied by a declaration or other evidence necessary to advise the court of the facts relevant to the relief requested.

~~**Advisory Committee Comment (2005)**~~

~~**Subdivision (a).** Filling gaps, revised rule 42(a)(2) requires the certificate or declaration to state the addresses and telephone numbers of all attorneys of record and all unrepresented parties, and the name of the party represented by each attorney.~~

~~Former rule 42(a)(4)–(5) required the certificate or declaration to state the filing date of any notice of intention to move for a new trial, the date and content of any ruling on that motion, and the service date of notice of that ruling. But these facts were relevant only insofar as they reflected one ground to extend the time to appeal under rule 3. The provision was underinclusive, because rule 3 recognizes additional grounds to extend the time to appeal. In a substantive change, revised rule 42(a)(4) therefore requires instead that the certificate or declaration state the factual basis of "any extension of the time to appeal under rule 3."~~

~~Former rule 40(a)(7) specified several documents whose filing dates the certificate or declaration was required to state. But these documents were relevant only insofar as they affected the process of procuring the record on appeal. The provision was underinclusive, because other documents may also be relevant to that process. In a substantive change, revised rule 42(a)(6) requires instead that the certificate or declaration state the filing date of "any document necessary to procure the record on appeal."~~

~~Former rule 42(a)(8) required the certificate or declaration to state the date of either "certification" of the record or "the facts relating to failure to certify." But the rules on appeals in civil and noncapital criminal cases contain no procedure for certifying the *record*; and no party may make a motion to *dismiss* an appeal in death penalty appeals, which are taken automatically (rule 34(a)). Former rule 42(a)(8) also required the certificate or declaration to state the fact that no proceeding for record preparation was pending in superior court or that the time to institute such a proceeding had expired. Revised rule 42(a)(7) focuses the provision on its purpose by requiring the certificate or declaration to state "the status of the record preparation process," including any order extending time to prepare the record.~~

Rule 8.60. ~~45.~~ Extending ~~and shortening~~ time

(a) Computing time

The Code of Civil Procedure governs computing and extending the time to do any act required or permitted under these rules.

(b) Extending time

For good cause—or exceptional good cause, when required by these rules—and except as these rules provide otherwise, the Chief Justice or presiding justice may extend the time to do any act required or permitted under these rules.

~~**(c) Shortening time**~~

~~For good cause and except as these rules provide otherwise, the Chief Justice or presiding justice may shorten the time to do any act required or permitted under these rules.~~

~~(d)~~(c) Application for extension

(1) An application to extend time must include a declaration stating facts, not mere conclusions, and must be served on all parties. For good cause, the Chief Justice or presiding justice may excuse advance service.

(2) The application must state:

(A) The due date of the document to be filed;

(B) The length of the extension requested;

(C) Whether any earlier extensions have been granted and, if so, their lengths and whether granted by stipulation or by the court; and

(D) Good cause—or exceptional good cause, when required by these rules—for granting the extension, consistent with the factors in rule ~~45.5~~ 8.63(b).

~~(e)~~(d) Relief from default

For good cause, a reviewing court may relieve a party from default for any failure to comply with these rules except the failure to file a timely notice of appeal or a timely statement of reasonable grounds in support of a certificate of probable cause.

~~(f)~~(e) No extension by superior court

Except as these rules provide otherwise, a superior court may not extend the time to do any act to prepare the appellate record.

~~(g)~~(f) Notice to party

(1) In a civil case, counsel must deliver to the client a copy of any stipulation or application to extend time that counsel files. Counsel must attach evidence of such delivery to the stipulation or application, or certify in the stipulation or application that the copy has been delivered.

(2) In a class action, the copy required under (1) need be delivered to only one represented party.

(3) The evidence or certification of delivery under (1) need not include the address of the party notified.

~~**Advisory Committee Comment**~~

~~**Subdivision (d).** Revised rule 45(d) is former rule 45.5(b).~~

~~**Subdivision (e).** Filling a gap, revised rule 45(e) specifies that in appeals after a plea of guilty or nolo contendere, the reviewing court may not relieve any party from default for failure to file the timely statement of reasonable grounds in support of a certificate of probable cause required by rule 30(b)(1). (See *In re Chavez* (2003) 30 Cal.4th 643, 652–653.)~~

~~Former subdivision (c). Former rule 45(c) provided that the time to file a notice of appeal could not be extended. The provision has been moved to rules 2(b) and 30.1(a).~~

~~Former rule 45(c) provided that the time to file a petition in the Supreme Court to review a Court of Appeal decision could not be extended. The provision has been moved to rule 28(e)(2).~~

~~Former rule 45(c) provided that the time to grant or deny a petition for rehearing in the Court of Appeal could not be extended. The provision has been moved to rule 25(c).~~

~~Former rule 45(c) provided that the time to grant or deny a petition for Supreme Court review of a Court of Appeal decision could be extended only as provided in former rule 28(a). The provision is deleted as unnecessary; revised rule 28.2(b) now states the only manner in which the Supreme Court may extend that time.~~

~~Former rule 45(c) provided that the time to grant or deny a petition for rehearing in the Supreme Court could be extended only as provided in former rule 24(a). The provision is deleted as unnecessary; revised rule 29.5(c) now states the only manner in which the Supreme Court may extend that time.~~

~~Former rule 45(c) included provisions relating to the time to do certain acts under former rules 62 and 63(d). Those rules were repealed effective January 1, 2003.~~

~~Former rule 45(c) included a provision authorizing the Chief Justice or presiding justice to relieve a party from default for failure to file a timely petition for review or rehearing. The provision has been moved to rule 25(b)(4) in the case of the Court of Appeal and to rules 28(e)(2) and 29.5(b) in the case of the Supreme Court.~~

(Reviser's note: Former rule 45(c) is now rule 8.68.)

Rule 8.63. ~~45.5.~~ Policies and factors governing extensions of time

(a) Policies

(1) The time limits prescribed by these rules should generally be met to ensure expeditious conduct of appellate business and public confidence in the efficient administration of appellate justice.

(2) The effective assistance of counsel to which a party is entitled includes adequate time for counsel to prepare briefs or other documents that fully advance the party's interests. Adequate time also allows the preparation of accurate, clear, concise, and complete submissions that assist the courts.

(3) For a variety of legitimate reasons, counsel may not always be able to prepare briefs or other documents within the time specified in the rules of court. To balance the competing policies stated in (1) and (2), applications to extend time in the reviewing courts must demonstrate good cause—or exceptional good cause, when required by these rules—under (b). If good cause is shown, time must be extended.

(b) Factors considered

In determining good cause—or exceptional good cause, when required by these rules—the court must consider the following factors when applicable:

(1) The degree of prejudice, if any, to any party from a grant or denial of the extension. A party claiming prejudice must support the claim in detail.

(2) In a civil case, the positions of the client and any opponent with regard to the extension.

(3) The length of the record, including the number of relevant trial exhibits. A party relying on this factor must specify the length of the record. In a civil case, a record containing one volume of clerk's transcript or appendix and two volumes of reporter's transcript is considered an average-length record.

(4) The number and complexity of the issues raised. A party relying on this factor must specify the issues.

(5) Whether there are settlement negotiations and, if so, how far they have progressed and when they might be completed.

(6) Whether the case is entitled to priority.

(7) Whether counsel responsible for preparing the document is new to the case.

(8) Whether other counsel or the client needs additional time to review the document.

(9) Whether counsel responsible for preparing the document has other time-limited commitments that prevent timely filing of the document. Mere conclusory statements that more time is needed because of other pressing business will not suffice. Good cause requires a specific showing of other obligations of counsel that:

(A) Have deadlines that as a practical matter preclude filing the document by the due date without impairing its quality~~,~~; or

(B) Arise from cases entitled to priority.

(10) Illness of counsel, a personal emergency, or a planned vacation that counsel did not reasonably expect to conflict with the due date and cannot reasonably rearrange.

(11) Any other factor that constitutes good cause in the context of the case.

~~**Advisory Committee Comment (2005)**~~

~~**Subdivision (a).** Revised rule 45.5(a) restates in simpler terms the policies governing extensions of time set forth in former rule 45.5(a), but intends no substantive change.~~

~~**Subdivision (c).** Former rule 45.5(c)(3) stated that the "average-length record" on appeal was one volume of clerk's transcript and two volumes of reporter's transcript. Because the average-length record in appeals from judgments of death is much longer, revised rule 45.5(c)(3) limits the statement to civil cases. The revised rule also adds a reference to appendixes (rule 5.1).~~

~~**Former subdivision (b).** Former rule 45.5(b) is now revised rule 45(d).~~

Rule 8.66.~~45.1.~~ ~~Appellate emergencies~~ Extending time because of public emergency

(a) Emergency extensions of time

If made necessary by the occurrence or danger of an earthquake, fire, or other public ~~calamity~~ emergency, or by the destruction of or danger to a building housing a reviewing court, the Chair of the Judicial Council, notwithstanding any other rule in this title, may:

(1) Extend by no more than 14 additional days the time to do any act required or permitted under these rules~~,~~; or

(2) Authorize specified courts to extend by no more than 30 additional days the time to do any act required or permitted under these rules.

(b) Applicability of order

(1) An order under (a) must specify whether it applies throughout the state, only to specified courts, or only to courts or attorneys in specified geographic areas, or applies in some other manner.

(2) An order of the Chair of the Judicial Council under (a)(2) must specify the length of the authorized extension.

(c) Additional extensions

If made necessary by the nature or extent of the public ~~calamity~~ emergency, the Chair of the Judicial Council may extend or renew an order issued under (a) for an additional period of:

(1) No more than 14 days for an order under (a)(1); or

(2) No more than 30 days for an order under (a)(2).

~~**Advisory Committee Comment (2005)**~~

~~Revised rule 45.1 restates in simpler terms the procedures set forth in former rule 45.1 for granting emergency extensions of time in cases of public calamity, but intends no substantive change.~~

~~**Subdivision (a).** Former rule 45.1(2) authorized the Chair of the Judicial Council to order that no more than 14 days "be excluded from any computation of the time" to do any act required or permitted under the rules. Revised rule 45.1 deletes this provision because it in effect duplicates subdivision (a)(1) of the revised rule, which authorizes the Chair to *extend* by the same 14 days the time to do any act required or permitted under the rules. No substantive change is intended.~~

Rule 8.68. Shortening time

For good cause and except as these rules provide otherwise, the Chief Justice or presiding justice may shorten the time to do any act required or permitted under these rules.

(Reviser's note: Rule 8.68 is former rule 45(c).)

Chapter 2. Civil Appeals

Article 1. Taking the Appeal

Rule 8.100. ~~1. Taking the~~ Filing the appeal

(a) Notice of appeal

(1) To appeal from a superior court judgment or an appealable order of a superior court, other than in a limited civil case, an appellant must serve and file a notice of appeal in that superior court. The appellant or the appellant's attorney must sign the notice.

(2) The notice of appeal must be liberally construed. The notice is sufficient if it identifies the particular judgment or order being appealed. The notice need not specify the court to which the appeal is taken; the appeal will be treated as taken to the Court of Appeal for the district in which the superior court is located.

(3) Failure to serve the notice of appeal neither prevents its filing nor affects its validity, but the appellant may be required to remedy the failure.

(b) Fee and deposit

(1) Unless otherwise provided by law, the notice of appeal must be accompanied by a $655 filing fee under Government Code sections 68926 and 68926.1(b), an application for a waiver of court fees and costs on appeal under rules ~~985~~ 3.50–3.63, or an order granting such an application. The fee should be paid by check or money order payable to "Clerk, Court of Appeal"; if the fee is paid in cash, the clerk must give a receipt.

(2) The appellant must also deposit $100 with the superior court clerk under Government Code section 68926.1, unless otherwise provided by law or the superior court waives the deposit under rule ~~985~~ 3.50–3.63.

(3) The clerk must file the notice of appeal even if the appellant does not present the filing fee, the deposit, or an application for, or order granting, a waiver under rules ~~985~~ 3.50–3.63.

(c) Failure to pay fee or deposit

(1) The reviewing court clerk must promptly notify the appellant in writing if:

(A) The reviewing court receives a notice of appeal without the filing fee required by (b)(1), a certificate of cash payment under (d)(5), or an application for, or order granting, a fee waiver under rules ~~985~~ 3.50–3.63;

(B) A check for the filing fee is dishonored; or

(C) An application for a waiver under rules ~~985~~ 3.50–3.63 is denied.

(2) A clerk's notice under (1) must state that the appeal will be dismissed unless, within 15 days after the notice is sent, the appellant either:

(A) Pays the fee; or

(B) Files an application for a waiver under rules ~~985~~ 3.50–3.63 if the appellant has not previously filed such an application.

(3) If the appellant fails to comply with (b)(2), the superior court clerk must promptly notify the appellant in writing that the appeal will be dismissed unless, within 15 days after the notice is sent, the appellant either:

(A) Makes the deposit; or

(B) Files an application in the superior court for a waiver under rules ~~985~~ 3.50–3.63 if the appellant has not previously filed such an application.

(4) If the appellant fails to comply with a notice given under (3), the superior court clerk must notify the reviewing court of the default.

(5) If the appellant fails to comply with a notice given under (2), or the superior court clerk notifies the reviewing court ~~of a default~~ under (4) of a default, the reviewing court may dismiss the appeal, but may vacate the dismissal for good cause.

(d) Superior court clerk's duties

(1) The superior court clerk must promptly mail a notification of the filing of the notice of appeal to the attorney of record for each party, to any unrepresented party, and to the reviewing court clerk.

(2) The notification must show the date it was mailed, and must state the number and title of the case and the date the notice of appeal was filed. If the information is available, the notification must include:

(A) The name, address, telephone number, and California State Bar number of each attorney of record in the case;

(B) The name of the party each attorney represented in the superior court; and

(C) The name, address, and telephone number of any unrepresented party.

(3) A copy of the notice of appeal is sufficient notification under (1) if the required information is on the copy or is added by the superior court clerk.

(4) The mailing of a notification under (1) is a sufficient performance of the clerk's duty despite the death of the party or the discharge, disqualification, suspension, disbarment, or death of the attorney.

(5) With the notification of the appeal, the superior court clerk must send the reviewing court the filing fee or an application for, or order granting, a waiver of that fee. If the fee was paid in cash, the clerk must send the reviewing court a certificate of payment and thereafter a check for the amount of the fee.

(6) Failure to comply with any provision of this subdivision does not affect the validity of the notice of appeal.

(e) Notice of cross-appeal

As used in this rule, "notice of appeal" includes a notice of cross-appeal and "appellant" includes a respondent filing a notice of cross-appeal.

(f) Civil case information statement

(1) On receiving notice of the filing of a notice of appeal under (d)(1), the reviewing court clerk must promptly mail the appellant a copy of the *Civil*

Case Information Statement (form APP-004) ~~prescribed by the Judicial Council~~ and a notice that the statement must be filed within 10 days.

(2) Within 10 days after the clerk mails the notice required by (1), the appellant must serve and file in the reviewing court a completed *Civil Case Information Statement*, attaching a copy of the judgment or appealed order that shows the date it was entered.

(3) If the appellant fails to timely file a case information statement under (2), the reviewing court clerk must notify the appellant by mail that the appellant must file the statement within 15 days after the clerk's notice is mailed and that failure to comply will result in either the imposition of monetary sanctions or dismissal of the appeal. If the appellant fails to comply with the notice, the court may impose the sanctions specified in the notice.

Advisory Committee Comment [revised version]

Subdivision (a). In subdivision (a)(1), the reference to "judgment" is intended to include part of a judgment. Subdivision (a)(1) includes an explicit reference to "appealable order" to ensure that litigants do not overlook the applicability of this rule to such orders.

Subdivision (b). In the interest of consistency, subdivision (b)(1) recommends a preferred wording—"Clerk, Court of Appeal"—for the name of the payee of checks or money orders for the filing fee. The provision is not mandatory.

Subdivision (d). Under subdivision (d)(2), a notification of the filing of a notice of appeal must show the date that the clerk mailed the document. This provision is intended to establish the date when the 20-day extension of the time to file a cross-appeal under rule 8.108(e) begins to run.

Subdivision (d)(1) requires the clerk to mail a notification of the filing of the notice of appeal to the appellant's attorney or to the appellant if unrepresented. Knowledge of the date of that notification allows the appellant's attorney or the appellant to track the running of the 20-day extension of time to file a cross-appeal under rule 8.108(e).

Advisory Committee Comment ~~(2002)~~ [version showing revisions]

Subdivision (a). ~~Revised~~ In subdivision (a)(1)~~ and (2) deletes as surplusage the reference to an appeal from "a particular part of the judgment" in former subdivision (a):~~ , the reference to "judgment" is intended to include part of a judgment. ~~Although the general definitional rule (rule 40) defines judgment to include appealable order, revised~~ Subdivision (a)(1) ~~adds~~includes an explicit reference to "appealable order" to ensure that litigants do not overlook the applicability of this rule to such orders.

~~Under both former subdivision (a) and revised subdivision (a)(3), failure to serve a notice of appeal does not prevent its filing or affect its validity; good practice, however, requires such service.~~

Subdivision (b). ~~Revised subdivision (b) is former subdivision (c).~~

~~Revised subdivision (b)(1) requires the appellant to accompany the notice of appeal with either the filing fee or "an application for a waiver of court fees and costs on appeal under rule 985, or an order granting such an application." This is a substantive change intended to alert indigent appellants to the option of proceeding under rule 985. (See also revised subd. (b)(2).)~~

In the interest of consistency, ~~revised~~ subdivision (b)(1) recommends a preferred wording—"Clerk, Court of Appeal"—for the name of the payee of checks or money orders for the filing fee. The provision is not mandatory.

~~Revised subdivision (b)(2) deletes the reference to "index" in former subdivision (c), in order to conform the rule to the 1993 amendment of Government Code section 68926.1.~~

~~**Subdivision (c).** Revised subdivision (c) is former rule 10(a). The provision has been moved to rule 1 in order to inform appellants as soon as possible of the serious consequence of a failure to pay the fee and deposit required when filing a notice of appeal.~~

~~Under the former rule, an appellant receiving a notice of default for failure to pay the filing fee was required, if the fee could not be excused, *both* to pay the fee and to "show[] good cause [i.e., to the reviewing court] why it was not [previously] paid . . . ." (Former rule 10(a).) Revised subdivision (c)(2)(A) deletes the latter requirement as an unnecessary burden on appellants and reviewing courts.~~

~~Revised subdivision (c)(3) and (4) fills a gap in the former rule, which was silent on the consequences of a failure to make the deposit required by revised subdivision (b)(2).~~

~~Revised subdivision (c)(5), like former rule 10(a) (second paragraph), recognizes that the reviewing court has discretion to dismiss an appeal for failure to pay the required filing fee or deposit, and to vacate that dismissal for good cause.~~

Subdivision (d). ~~Revised subdivision (d) is former subdivision (b).~~

Under ~~revised~~ subdivision (d)(2), a notification of the filing of a notice of appeal must show the date ~~on which~~ that the clerk mailed the document~~, analogously to the clerk's "certificate of mailing" currently in use in many superior courts and required by certain Judicial Council forms (see, e.g., Form SC-140 [*Notice of Filing Notice of Appeal* in small claims cases])~~. This provision is ~~a substantive change~~ intended to establish the date when the 20-day extension of the time to file a cross-appeal under ~~revised~~ rule ~~3~~ 8.108(e) begins to run.

~~In revised~~ Subdivision (d)(1)~~, the requirement~~requires ~~that~~ the clerk to mail a notification of the filing of the notice of appeal to the appellant's attorney~~,~~ or to the appellant if unrepresented~~, is a substantive change:~~. Knowledge of the date of that notification allows the appellant's attorney or the appellant to track the running of the 20-day extension of time to file a cross-appeal under ~~revised~~ rule ~~3~~ 8.108(e).

~~In revised subdivision (d)(1), the directive of former subdivision (b) that the clerk notify an unrepresented party at the latter's "last known address" is deleted as surplusage.~~

~~Revised subdivision (d)(2) makes it clear that the superior court clerk is not required to notify the reviewing court clerk of the address and telephone number of any *party* represented by an attorney. The~~

~~requirement that the superior court clerk notify the reviewing court clerk of the name, address, and telephone number of any *unrepresented* party fills a gap in former subdivision (b).~~

~~The fourth paragraph of former subdivision (b) required the clerk, upon the filing of a notice of appeal, to send a copy of the court reporters list (see rule 980.4) to the parties and to the reviewing court clerk. In current practice, however, if appellate counsel receive this list at all, it is usually too late to be of practical use. The revised rule therefore deletes this provision in a substantive change intended to relieve the clerk of an unnecessary burden.~~

~~Former subdivision (d), which identified the grounds for excusing payment of the filing fee, has been superseded by rule 985 and is therefore deleted from the revised rule.~~

Rule 8.104. ~~2.~~ Time to appeal

(a) Normal time

Unless a statute or rule ~~3~~ 8.108 provides otherwise, a notice of appeal must be filed on or before the earliest of:

(1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was mailed;

(2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or

(3) 180 days after entry of judgment.

(b) No extension of time; late notice of appeal

Except as provided in rule ~~45.1~~ 8.66, no court may extend the time to file a notice of appeal. If a notice of appeal is filed late, the reviewing court must dismiss the appeal.

(c) Periodic payment of judgments against public entities

If a public entity elects, under Government Code section 984 and rule ~~389~~ 3.1804, to pay a judgment in periodic payments, subdivision (a) of this rule governs the time to appeal from that judgment but the periods prescribed in (a)(1) and (2) are each 90 days.

(d) What constitutes entry

For purposes of this rule:

(1) The entry date of a judgment is the date the judgment is filed under Code of Civil Procedure section 668.5, or the date it is entered in the judgment book.

(2) The entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes. But if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed; a written order prepared under rule ~~391~~ 3.1312 or similar local rule is not such an order prepared by direction of a minute order.

(3) The entry date of an appealable order that is not entered in the minutes is the date the signed order is filed.

(4) The entry date of a decree of distribution in a probate proceeding is the date it is entered at length in the judgment book or other permanent court record.

(e) Premature notice of appeal

(1) A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment.

(2) The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment.

(f) Appealable order

As used in (a) and (e), "judgment" includes an appealable order if the appeal is from an appealable order.

Advisory Committee Comment [revised version]

Subdivision (a). Under subdivision (a)(1), a notice of entry of judgment (or a copy of the judgment) must show the date on which the clerk mailed the document. This provision is intended to establish the date that the 60-day period under subdivision (a)(1) begins to run.

Subdivision (a)(2) requires that a notice of entry of judgment (or a copy of the judgment) served by or on a party be accompanied by proof of service. The proof of service establishes the date that the 60-day period under subdivision (a)(2) begins to run. Although the general rule on service (rule 8.25(a)) requires proof of service for all documents served by parties, the requirement is reiterated here because of the serious consequence of a failure to file a timely notice of appeal (see subd. (e)).

Subdivision (b). Subdivision (b) is declarative of the case law, which holds that the reviewing court lacks jurisdiction to excuse a late-filed notice of appeal. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666–674; *Estate of Hanley* (1943) 23 Cal.2d 120, 122–124.)

In criminal cases, the time for filing a notice of appeal is governed by rule 8.408 and by the case law of "constructive filing." (See, e.g., *In re Jordan* (1992) 4 Cal.4th 116; *In re Benoit* (1973) 10 Cal.3d 72.)

Advisory Committee Comment ~~(2002)~~ [version showing revisions]

Subdivision (a). ~~Revised subdivision (a) simplifies the introductory exception clause of former subdivision (a) by deleting the specific reference to Code of Civil Procedure section 870; no reason appears to single out that statute from among the several statutes that provide notice of appeal filing times different from those provided in this rule (see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 473, p. 522). The general reference to the latter statutes is continued in the revised rule because of the serious consequence of a failure to file a timely notice of appeal (see revised subd. (e)).~~

Under ~~revised~~ subdivision (a)(1), a notice of entry of judgment (or a copy of the judgment) must show the date on which the clerk mailed the document~~, analogously to the clerk's "certificate of mailing" currently in use in many superior courts and required by certain Judicial Council forms (see, e.g., Form 1290 [*Notice of Entry of Judgment* in family law cases])~~. This provision is ~~a substantive change~~ intended to establish the date that the 60-day period under ~~revised~~ subdivision (a)(1) begins to run.

~~Revised subdivision (a)(1) also spells out what is implied in former subdivision (a), i.e., that the clerk mails the notice of entry of judgment (or a copy of the judgment) to "the party filing the notice of appeal." (See also revised subd. (a)(2).)~~

~~Revised~~ Subdivision (a)(2) requires that a notice of entry of judgment (or a copy of the judgment) served by or on a party be accompanied by proof of service. The proof of service establishes the date that the 60-day period under ~~revised~~ subdivision (a)(2) begins to run. Although the general ~~definitional~~ rule on service (rule ~~40~~ 8.25(a)) requires proof of service for all documents served by parties, the requirement is reiterated here because of the serious consequence of a failure to file a timely notice of appeal (see ~~revised~~ subd. (e)).

~~**Subdivision (b).** Revised subdivision (b) is the second paragraph of former rule 2.5(c). The first paragraph of former rule 2.5(c) and the last sentence of its second paragraph are deleted as superfluous. The provisions of former rule 2.5(a) and (b) have been moved to new rule 389.~~

~~**Subdivision (c).** Revised subdivision (c)(2) deletes as surplusage the words "expressly" and "signed and filed" from the phrase, "expressly directs that a written order be prepared, signed, and filed," in former subdivision (b).~~

Subdivision ~~(c)~~(b). ~~New subdivision (e) spells out what is implied in rule 45(c) ("The time for filing a notice of appeal . . . shall not be extended") and (e) (any default may be relieved "except the failure to give timely notice of appeal"). These provisions are~~ Subdivision (b) is declarative of the case law, which holds that the reviewing court lacks jurisdiction to excuse a late-filed notice of appeal. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666–674; *Estate of Hanley* (1943) 23 Cal.2d 120, 122–

124.)

In criminal cases, the time for filing a notice of appeal is governed by rule ~~31~~ 8.408 and by the case law of "constructive filing." (See, e.g., *In re Jordan* (1992) 4 Cal.4th 116; *In re Benoit* (1973) 10 Cal.3d 72.)

Rule 8.108. ~~3. Extensions of~~ Extending the time to appeal

(a) Motion for new trial

If any party serves and files a valid notice of intention to move for a new trial and the motion is denied, the time to appeal from the judgment is extended for all parties until the earliest of:

(1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order;

(2) 30 days after denial of the motion by operation of law; or

(3) 180 days after entry of judgment.

(b) Motion to vacate judgment

If, within the time prescribed by rule ~~2~~ 8.104 to appeal from the judgment, any party serves and files a valid notice of intention to move—or a valid motion—to vacate the judgment, the time to appeal from the judgment is extended for all parties until the earliest of:

(1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order;

(2) 90 days after the first notice of intention to move—or motion—is filed; or

(3) 180 days after entry of judgment.

(c) Motion for judgment notwithstanding the verdict

(1) If any party serves and files a valid motion for judgment notwithstanding the verdict and the motion is denied, the time to appeal from the judgment is extended for all parties until the earliest of:

(A) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order;

(B) 30 days after denial of the motion by operation of law; or

(C) 180 days after entry of judgment.

(2) Unless extended by (e)(2), the time to appeal from an order denying a motion for judgment notwithstanding the verdict is governed by rule ~~2~~ 8.104~~, unless extended by rule 3(e)(2)~~.

(d) Motion to reconsider appealable order

If any party serves and files a valid motion to reconsider an appealable order under Code of Civil Procedure section 1008, subdivision (a), the time to appeal from that order is extended for all parties until the earliest of:

(1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order;

(2) 90 days after the first motion to reconsider is filed; or

(3) 180 days after entry of the appealable order.

(e) Cross-appeal

(1) If an appellant timely appeals from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is extended until 20 days after the superior court clerk mails notification of the first appeal.

(2) If an appellant timely appeals from an order granting a motion for new trial, an order granting—within 150 days after entry of judgment—a motion to vacate the judgment, or a judgment notwithstanding the verdict, the time for any other party to appeal from the original judgment or from an order denying a motion for judgment notwithstanding the verdict is extended until 20 days after the clerk mails notification of the first appeal.

(f) Showing date of order or notice; proof of service

An order or notice mailed by the clerk under this rule must show the date it was mailed. An order or notice served by a party must be accompanied by proof of service.

Advisory Committee Comment [revised version]

Rule 8.108 provides various circumstances in which the time to appeal is "extended." The use of the word "extended" limits the scope of the rule: i.e., the rule operates only to *increase* any time to appeal otherwise prescribed; it cannot shorten the time. Thus if the time provided by rule 8.108 would be less than the normal time to appeal stated in rule 8.104(a)—e.g., when a new trial motion is denied before notice of entry of judgment is given—the rule 8.104(a) time governs.

Subdivisions (a), (b), (c), and (d) operate only when a party serves and files a "valid" motion or notice of intent to move for the relief in question. As used in these provisions, the word "valid" means only that the motion or notice complies with all procedural requirements; it does not mean that the motion or notice must also be substantively meritorious. For example, under the rule a timely new trial motion on the ground of excessive damages (Code Civ. Proc., § 657) extends the time to appeal from the judgment even if the trial court ultimately determines the damages were not excessive. Similarly, a timely motion to reconsider (*id*., § 1008) extends the time to appeal from an appealable order for which reconsideration was sought even if the trial court ultimately determines the motion was not "based upon new or different facts, circumstances, or law," as subdivision (a) of section 1008 requires.

Subdivision (a). Subdivision (a)(1) provides that the denial of a motion for new trial triggers a 30-day extension of the time to appeal from the judgment beginning on the date that the superior court clerk mails, or a party serves, either the order of denial or a notice of entry of that order. This provision is intended to eliminate a trap for litigants and to make the rule consistent with the primary rule on the time to appeal from the judgment (rule 8.104(a)).

Subdivision (b). The Code of Civil Procedure provides two distinct statutory motions to vacate a judgment: (1) a motion to vacate a judgment and enter "another and different judgment" because of judicial error (*id*., § 663), which requires a notice of intention to move to vacate (*id*., § 663a); and (2) a motion to vacate a judgment because of mistake, inadvertence, surprise, or neglect, which requires a motion to vacate but not a notice of intention to so move (*id*., § 473, subd. (b)). The courts also recognize certain nonstatutory motions to vacate a judgment, e.g., when the judgment is void on the face of the record or was obtained by extrinsic fraud. (See 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, §§ 222–236, pp. 726–750.) Subdivision (b) is intended to apply to all such motions.

In subdivision (b) the phrase, "within the time prescribed by rule 8.104 to appeal from the judgment," is intended to incorporate in full the provisions of rule 8.104(a).

Under subdivision (b)(1), the 30-day extension of the time to appeal from the judgment begins when the superior court clerk mails, or a party serves, the order denying the motion or notice of entry of that order. This provision is discussed further under subdivision (a) of this comment.

Subdivision (c). Subdivision (c)(1) provides an extension of time after an order denying a motion for judgment notwithstanding the verdict regardless of whether the moving party also moved unsuccessfully for a new trial.

Subdivision (c) further specifies the times to appeal when, as often occurs, a motion for judgment notwithstanding the verdict is joined with a motion for new trial and both motions are denied. Under subdivision (a), the appellant has 30 days after notice of the denial of the new trial motion to appeal from the judgment. Subdivision (c) allows the appellant the longer time provided by rule 8.104 to appeal from the order denying the motion for judgment notwithstanding the verdict, subject to that time being further extended in the circumstances covered by subdivision (e)(2).

Under subdivision (c)(1)(A), the 30-day extension of the time to appeal from the judgment begins when the superior court clerk mails, or a party serves, the order denying the motion or notice of entry of that order. This provision is discussed further under subdivision (a) of this comment.

Subdivision (d). The scope of subdivision (d) is specific. It applies to any "appealable order," whether made before or after judgment (see Code Civ. Proc., § 904.1, subd. (a)(2)–(12)), but it extends only the time to appeal "from that order." The subdivision thus takes no position on whether a judgment is subject to a motion to reconsider (see, e.g., *Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233, 1236–1238 [postjudgment motion to reconsider order granting summary judgment did not extend time to appeal from judgment because trial court had no power to rule on such motion after entry of judgment]), or whether an order denying a motion to reconsider is itself appealable (compare *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 710–711 [order appealable if motion based on new facts] with *Rojes v. Riverside General Hospital* (1988) 203 Cal.App.3d 1151, 1160–1161 [order not appealable under any circumstances]). Both these issues are legislative matters.

Subdivision (d) applies only when a "party" makes a valid motion to "reconsider" an appealable order under subdivision (a) of Code of Civil Procedure section 1008; it therefore does not apply when a court reconsiders an order on its own motion (*id.*, subd. (c)) or when a party makes "a subsequent application for the same order" (*id.*, subd. (b)). The statute provides no time limits within which either of the latter events must occur.

Under subdivision (d)(1), the 30-day extension of the time to appeal from the order begins when the superior court clerk mails, or a party serves, the order denying the motion or notice of entry of that order. The purpose of this provision is discussed further under subdivision (a) of this comment.

Among its alternative periods of extension of the time to appeal, subdivision (d) provides in paragraph (2) for a 90-day period beginning on the filing of the motion to reconsider or, if there is more than one such motion, the filing of the first such motion. The provision is consistent with subdivision (b)(2), governing motions to vacate judgment; as in the case of those motions, there is no time limit for a ruling on a motion to reconsider.

Subdivision (e). Consistent with case law, subdivision (e)(1) extends the time to appeal after another party appeals only if the later appeal is taken "from the same order or judgment as the first appeal." (*Commercial & Farmers Nat. Bank v. Edwards* (1979) 91 Cal.App.3d 699, 704.)

The former rule (former rule 3(c), second sentence) provided an extension of time for filing a protective cross-appeal from the judgment when the trial court granted a motion for new trial or a motion to vacate the judgment, but did not provide the same extension when the trial court granted a motion for judgment notwithstanding the verdict. One case declined to infer that the omission was unintentional, but suggested that the Judicial Council might consider amending the rule to fill the gap. (*Lippert v. AVCO Community Developers, Inc.* (1976) 60 Cal.App.3d 775, 778 & fn. 3.) Rule 8.108(e)(2) fills the gap thus identified.

Subdivision (f). Under subdivision (f), an order or notice mailed by the clerk under this rule must show the date on which the clerk mailed the document, analogously to the clerk's "certificate of mailing" currently in use in many superior courts. This provision is intended to establish the date when an extension of the time to appeal begins to run after the clerk mails such an order or notice.

Subdivision (f) also requires that an order or notice served by a party under this rule be accompanied by proof of service. The proof of service establishes the date when an extension of the time to appeal begins to run after the party serves such an order or notice.

Advisory Committee Comment ~~(2002)~~ [version showing revisions]

~~Revised~~ Rule ~~3~~ 8.108 provides various circumstances in which the time to appeal is "extended." The use of the word "extended" limits the scope of the rule: i.e., the rule operates only to *increase* any time to appeal otherwise prescribed; it cannot shorten the time. Thus if the time provided by rule ~~3~~ 8.108 would be less than the normal time to appeal stated in rule ~~2~~ 8.104(a)—e.g., when a new trial motion is denied before notice of entry of judgment is given—the rule ~~2~~ 8.104(a) time governs.

~~Revised~~ Subdivisions (a), (b), (c), and (d) operate only when a party serves and files a "valid" motion or notice of intent to move for the relief in question. As used in these provisions, the word "valid" means only that the motion or notice complies with all procedural requirements; it does not mean that the motion or notice must also be substantively meritorious. For example, under the ~~revised~~ rule a timely new trial motion on the ground of excessive damages (Code Civ. Proc., § 657) extends the time to appeal from the judgment even if the trial court ultimately determines the damages were not excessive. Similarly, a timely motion to reconsider (*id.*, § 1008) extends the time to appeal from an appealable order for which reconsideration was sought even if the trial court ultimately determines the motion was not "based upon new or different facts, circumstances, or law," as subdivision (a) of section 1008 requires.

Subdivision (a). ~~Former~~ Subdivision (a)(1) provide~~d~~s that the denial of a motion for new trial trigger~~ed~~s a 30-day extension of the time to appeal from the judgment beginning on the date ~~of entry of the order of denial. Revised subdivision (a)(1) provides that the 30-day extension begins to run on the date~~ that the superior court clerk mails, or a party serves, either the order of denial or a notice of entry of that order. This provision is ~~a substantive change~~ intended to eliminate a trap for litigants and to make the rule consistent with the primary rule on the time to appeal from the judgment (~~revised~~ rule ~~2~~ 8.104(a)).

Subdivision (b). The Code of Civil Procedure provides two distinct statutory motions to vacate a judgment: (1) a motion to vacate a judgment and enter "another and different judgment" because of judicial error (*id.*, § 663), which requires a notice of intention to move to vacate (*id.*, § 663a); and (2) a motion to vacate a judgment because of mistake, inadvertence, surprise, or neglect, which requires a motion to vacate but not a notice of intention to so move (*id.*, § 473, subd. (b)). The courts also recognize certain nonstatutory motions to vacate a judgment, e.g., when the judgment is void on the face of the record or was obtained by extrinsic fraud. (See 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, §§ 222-236, pp. 726-750.) ~~Former subdivision (b) was intended to apply to all such motions; revised s~~Subdivision (b) is ~~likewise~~ intended to apply to all such motions.

In ~~revised~~ subdivision (b) the phrase, "within the time prescribed by rule ~~2~~ 8.104 to appeal from the judgment," is intended to incorporate in full the provisions of ~~revised~~ rule ~~2~~ 8.104(a).

Under ~~revised~~ subdivision (b)(1), the 30-day extension of the time to appeal from the judgment begins when the superior court clerk mails, or a party serves, the order denying the motion or notice of entry of that order. This ~~substantive change~~provision is discussed further under subdivision (a) of this comment.

Subdivision (c). ~~Revised subdivision (c) (former subd. (d)) makes two substantive changes. First, the former rule provided an extension of time after an order denying a motion for judgment notwithstanding the verdict only if the moving party had also moved for a new trial and that motion had been denied.~~

~~Revised s~~Subdivision (c)(1) ~~deletes the limitation as unduly restrictive, and~~ provides an extension of time after an order denying a motion for judgment notwithstanding the verdict regardless of whether the moving party also moved unsuccessfully for a new trial. ~~The change makes the provision for extensions after denial of a motion for judgment notwithstanding the verdict (revised subd. (c)) consistent with the provision for extensions after denial of a motion for new trial (revised subd. (a)).~~

~~Second, s~~Subdivision (c) further specifies the times to appeal ~~the former rule made provision for "the time for filing the notice of appeal from the judgment or from the denial of the motion to enter a judgment notwithstanding the verdict" (former subd. (d)); revised subdivision (c)(1) makes provision only for "the time to appeal from the judgment . . . ." The revision is intended to resolve an ambiguity arising~~ when, as often occurs, a motion for judgment notwithstanding the verdict is joined with a motion for new trial and both motions are denied. ~~A statute requires the court to rule on both motions at the same time. (Code Civ. Proc., §629, 2d par.) If both motions are denied, therefore, they will always be denied on the same date.~~ Under subdivision (a)~~the revised and former rules~~, the appellant ~~then~~ has 30 days after notice of the denial of the new trial motion to appeal from the judgment. Subdivision (c) allows~~; but under former rule 3(d) it was unclear whether~~ the appellant ~~had 30 or 60 days~~ the longer time provided by rule 8.104 to appeal from the order denying the motion for judgment notwithstanding the verdict, ~~unless~~ subject to that time ~~is~~ being further extended in the circumstances covered by ~~revised~~ subdivision (e)(2). ~~Construing the former rule to allow only 30 days for taking such an appeal served the interest in avoiding different time periods for appealing from the judgment and from the order denying the motion for judgment notwithstanding the verdict, a difference that could result in a party's filing two successive notices of appeal in the same case.~~

~~The construction served that interest, however, at the cost of creating a trap for litigants. The principal statute and rule on the subject declare that an order denying a motion for judgment notwithstanding the verdict is appealable (Code Civ. Proc., § 904.1, subd. (a)(4)) and that a party has at least 60 days to file a notice of appeal from an appealable order (rule 2(a)); but under the foregoing construction of former rule 3(d), when a denial of a motion for new trial was coupled with the denial of a motion for judgment notwithstanding the verdict, the party had in fact only 30 days to appeal from the latter order. Such a party could be further misled by the wording of the former rule itself, which stated that the time to appeal from the order denying the motion for judgment notwithstanding the verdict was "extended" for 30 days even though, under the foregoing construction, it was in effect shortened to 30 days from the 60 days provided generally by rule 2.~~

~~Because a late notice of appeal deprives the reviewing court of jurisdiction (revised rule 2(e)), the interest of litigants in avoiding the trap just described is substantial and outweighs whatever interest the courts may have in being spared the minor procedural complication of processing two successive notices of appeal from the same party. As a practical matter, moreover, that complication will probably be infrequent, because to save time and money a party wanting to appeal from the judgment and from an order denying the motion for judgment notwithstanding the verdict will be likely to file a single notice of appeal from both within the initial 30-day period. Finally, the revised rule eliminates the ambiguity in the above discussed use of the word "extended" in the former rule.~~

~~In view of the foregoing changes, revised subdivision (c)(2) deletes as superseded the second paragraph of former subdivision (d), except for its recognition that rule 2 governs the time within which a party may appeal from an order denying a motion for judgment notwithstanding the verdict, unless that time is extended in the circumstances covered by revised subdivision (e)(2).~~

Under ~~revised~~ subdivision (c)(1)(A), the 30-day extension of the time to appeal from the judgment begins when the superior court clerk mails, or a party serves, the order denying the motion or notice of entry of that order. This ~~substantive change~~ provision is discussed further under subdivision (a) of this comment.

Subdivision (d). ~~Revised subdivision (d) is new. Former rule 3 made no provision for an extension of the time to appeal from an appealable order when a party files a valid motion to reconsider that order (Code Civ. Proc., § 1008). The case law drew different inferences from the absence of such a provision. One line of cases held that former rule 3 should nevertheless be construed to apply to motions to reconsider because such motions are analogous to motions for new trial and motions to vacate the judgment, and for reasons of policy. (E.g., *Rojes v. Riverside General Hospital* (1988) 203 Cal.App.3d 1151, 1159-1160 (*Rojes*).) A subsequent case, however, inferred from former rule 3's silence on motions to reconsider that it was not intended to apply to such a motion (*Conservatorship of Coombs* (1998) 67 Cal.App.4th 1395, 1398); the court conceded that the reasoning of *Rojes*, *supra*, 203 Cal.App.3d at pages 1159-1160, "might justify" a rule extending the time to appeal after a motion to reconsider, but declared that such a rule "must come from the Judicial Council or the Legislature." (*Coombs*, *supra*, 67 Cal.App.4th at p. 1400.) Revised subdivision (d) provides such a rule. It is a substantive change intended to encourage recourse to the trial court for relief from an appealable order; if granted, such relief would obviate the need for an appeal. (See *Rojes*, *supra*, 203 Cal.App.3d at pp. 1159-1160.)~~

The scope of ~~revised~~ subdivision (d) is specific. It applies to any "appealable order," whether made before or after judgment (see Code Civ. Proc., § 904.1, subd. (a)(2)~~ to~~ (12)), but it extends only the time to appeal "from that order." The ~~revised~~ subdivision thus takes no position on whether a judgment is subject to a motion to reconsider (see, e.g., *Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233, 1236-1238 [postjudgment motion to reconsider order granting summary judgment did not extend time to appeal from judgment because trial court had no power to rule on such motion after entry of judgment]), or whether an order denying a motion to reconsider is itself appealable (compare *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 710-711 [order appealable if motion based on new facts] with ~~*Rojes*, *supra*, 203 Cal.App.3d at pp.~~ *Rojes v. Riverside General Hospital* (1988) 203 Cal.App.3d 1151, 1160-1161 [order not appealable under any circumstances]). Both these issues are legislative matters.

~~Revised~~ Subdivision (d) applies only when a "party" makes a valid motion to "reconsider" an appealable order under subdivision (a) of Code of Civil Procedure section 1008; it therefore does not apply when a court reconsiders an order on its own motion (*id.*, subd. (c)) or when a party makes "a subsequent application for the same order" (*id.*, subd. (b)). The statute provides no time limits within which either of the latter events must occur.

Under ~~revised~~ subdivision (d)(1), the 30-day extension of the time to appeal from the order begins when the superior court clerk mails, or a party serves, the order denying the motion or notice of entry of that order. The purpose of this provision is discussed further under subdivision (a) of this comment.

Among its alternative periods of extension of the time to appeal, ~~revised~~ subdivision (d) provides in paragraph (2) for a 90-day period beginning on the filing of the motion to reconsider or, if there is more than one such motion, the filing of the first such motion. The provision is consistent with ~~revised~~ subdivision (b)(2), governing motions to vacate judgment; as in the case of those motions, there is no time limit for a ruling on a motion to reconsider.

Subdivision (e). Consistent with case law, ~~revised~~ subdivision (e)(1) ~~(former subd. (c), first sentence)~~ extends the time to appeal after another party appeals only if the later appeal is taken "from the same order or judgment as the first appeal." (*Commercial & Farmers Nat. Bank v. Edwards* (1979) 91 Cal.App.3d 699, 704.)

~~The former rule governing the time to appeal after another party appeals (former subd. (c)) provided that the notice of appeal must be filed "within 20 days after" the superior court clerk mails notification of the first appeal "or within the time otherwise prescribed by the applicable subdivision, whichever period last expires." Revised subdivision (e)(1) provides instead that the time to appeal "is extended until" 20 days after the clerk mails notification of the first appeal. (See also revised subd. (e)(2).) The change simplifies the wording of the provision and makes it consistent with the remainder of this rule.~~

The former rule (former rule 3(c), second sentence) provided an extension of time for filing a protective cross-appeal from the judgment when the trial court granted a motion for new trial or a motion to vacate the judgment, but did not provide the same extension when the trial court granted a motion for judgment notwithstanding the verdict. One case declined to infer that the omission was unintentional, but suggested that the Judicial Council might consider amending the rule to fill the gap. (*Lippert v. AVCO Community Developers, Inc.* (1976) 60 Cal.App.3d 775, 778 & fn. 3.) ~~No reason appears to believe the omission was intentional; revised subdivision~~ Rule 8.108(e)(2) fills the gap thus identified.

Subdivision (f). ~~Revised subdivision (f) is new.~~ Under ~~this provision~~subdivision (f), an order or notice mailed by the clerk under this rule must show the date on which the clerk mailed the document, analogously to the clerk's "certificate of mailing" currently in use in many superior courts. This provision is ~~a substantive change~~ intended to establish the date when an extension of the time to appeal begins to run after the clerk mails such an order or notice.

~~Revised~~ Subdivision (f) also requires that an order or notice served by a party under this rule be accompanied by proof of service. The proof of service establishes the date when an extension of the time to appeal begins to run after the party serves such an order or notice. ~~Although the general definitional rule (rule 40) requires proof of service for all documents served by parties, the requirement is reiterated here because of the serious consequence of a failure to file a timely notice of appeal (see revised rule 2(e)).~~

Rule 8.112. ~~49.~~ Petition for writ of supersedeas

(a) Petition

(1) A party seeking a stay of the enforcement of a judgment or order pending appeal may serve and file a petition for writ of supersedeas in the reviewing court.

(2) The petition must bear the same title as the appeal and, if known, the appeal's docket number.

(3) The petition must explain the necessity for the writ and include points and authorities.

(4) If the record has not been filed in the reviewing court, the petition must include:

(A) The judgment or order, showing its date of entry;

(B) The notice of appeal, showing its date of filing; and

(C) A statement of the case, including a summary of the material facts.

(5) The petition must be verified.

(b) Opposition

(1) Unless otherwise ordered, any opposition must be served and filed within 15 days after the petition is filed.

(2) An opposition must state any material facts not included in the petition and include points and authorities.

(3) The court may not issue a writ of supersedeas until the respondent has had the opportunity to file an opposition.

(c) Temporary stay

(1) The petition may include a request for a temporary stay under rule ~~49.5~~ 8.116 pending the ruling on the petition.

(2) Except when the custody of a minor is involved, a separately filed request for a temporary stay need not be served on the respondent.

(d) Issuing the writ

(1) The court may issue the writ on any conditions it deems just.

(2) The court must hold a hearing before it may issue a writ staying an order that awards or changes the custody of a minor.

(3) The court must notify the superior court, under rule ~~56~~ 8.700(j), of any writ or temporary stay that it issues.

Rule 8.116. ~~49.5.~~ Request for writ of supersedeas or temporary stay

(a) Information on cover

If a petition for original writ, petition for review, or any other document requests a writ of supersedeas or temporary stay from a reviewing court, the cover of the document must:

(1) Prominently display the notice "STAY REQUESTED"; and

(2) Identify the nature and date of the proceeding or act sought to be stayed.

(b) Additional information

The following information must appear either on the cover or at the beginning of the text:

(1) The trial court and department involved~~,~~; and

(2) The name and telephone number of the trial judge whose order the request seeks to stay.

(c) Sanction

If the document does not comply with (a) and (b), the reviewing court may decline to consider the request for writ of supersedeas or temporary stay.

~~**Advisory Committee Comment (2005)**~~

~~**Subdivisions (a) and (b).** Revised rule 49.5(a)(2) and (b) are substantive changes designed to assist the reviewing courts in processing requests for writ of supersedeas or temporary stay.~~

Article 2. Record on Appeal

Rule 8.120. ~~5.~~ Clerk's transcript

(a) Notice of designation

(1) Within 10 days after filing the notice of appeal, an appellant must serve and file a notice in superior court designating the documents to be included in the clerk's transcript, unless the appeal proceeds by appendix under rule ~~5.1~~ 8.124, by stipulation under rule ~~5.2~~ 8.128, or by agreed or settled statement under rule ~~6~~ 8.134 or ~~7~~ 8.137 instead of a clerk's transcript.

(2) The appellant may combine its notice designating a clerk's transcript with any notice designating a reporter's transcript under rule ~~4~~ 8.130(a)(1), and may combine both with the notice of appeal.

(3) Within 10 days after the appellant serves its notice designating a clerk's transcript, the respondent may serve and file a notice in superior court

designating any additional documents the respondent wants included in the transcript.

(4) A notice designating a clerk's transcript must state the date the notice of appeal was filed and identify each designated document by its title and filing date or, if the filing date is not available, the date it was signed. The notice may specify portions of designated documents that are not to be included in the transcript. For minute orders or instructions, it is sufficient to collectively designate all minute orders or all minute orders entered between specified dates, or all written instructions given, refused, or withdrawn.

(5) Except as provided in (b)(4), all exhibits admitted in evidence, refused, or lodged are deemed part of the clerk's transcript, but a party wanting an exhibit copied in the transcript must specify that exhibit by number or letter in its notice of designation. If the superior court has returned a designated exhibit to a party, the party in possession of the exhibit must promptly deliver it to the superior court clerk.

(b) Contents of transcript

(1) The transcript must contain:

(A) The notice of appeal;

(B) Any judgment appealed from and any notice of its entry;

(C) Any order appealed from and any notice of its entry;

(D) Any notice of intention to move for a new trial, or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order, and any order on such motion and any notice of its entry;

(E) Any notices or stipulations to prepare clerk's or reporter's transcripts or to proceed by agreed or settled statement; and

(F) The register of actions, if any.

(2) Each document listed in (1)(A), (B), (C), and (D) must show the date necessary to determine the timeliness of the appeal.

(3) If designated by any party, the transcript must also contain:

(A) Any other document filed or lodged in the case in superior court;

(B) Any exhibit admitted in evidence, refused, or lodged; and

(C) Any instruction that a party submitted in writing.

(4) Unless the reviewing court orders or the parties stipulate otherwise, the clerk must not copy or transmit to the reviewing court the original of a deposition.

(c) Deposit for cost of transcript

(1) Within 30 days after the respondent files a designation under (a)(3) or the time for filing it expires, whichever first occurs, the superior court clerk must send:

(A) To the appellant, notice of the estimated cost to prepare an original and one copy of the clerk's transcript; and

(B) To each party other than the appellant, notice of the estimated cost to prepare a copy of the clerk's transcript for that party's use.

(2) A notice under (1) must show the date it was sent.

(3) Within 10 days after the clerk sends a notice under (1), the appellant and any party wanting to purchase a copy of the clerk's transcript must deposit the estimated cost with the clerk, unless otherwise provided by law or the party submits an application for, or an order granting, a waiver of the cost under rules ~~985~~ 3.50–3.63.

(d) Preparation of transcript

(1) Within 30 days after the appellant deposits the estimated cost of the transcript or the court files an order waiving that cost, the clerk must:

(A) Prepare an original and one copy of the transcript, and certify the original; and

(B) Prepare additional copies for which the parties have made deposits.

(2) If the appeal is abandoned or dismissed before the clerk has completed preparation of the transcript, the clerk must refund any portion of the deposit under (c) exceeding the preparation cost actually incurred.

Advisory Committee Comment [revised version]

Subdivision (a). Subdivision (a)(4) allows a party designating documents for inclusion in the clerk's transcript to specify *portions* of such documents that are not to be included, e.g., because they are duplicates of other designated documents or are not necessary for proper consideration of the issues raised in the appeal. The notice of designation should identify any portion to be omitted by means of a descriptive reference, e.g., by specific page or exhibit numbers. This provision is intended to simplify and therefore expedite the preparation of the clerk's transcript, to reduce its cost to the parties, and to relieve the courts of the burden of reviewing a record containing redundant, irrelevant, or immaterial documents.

Subdivision (b). Subdivision (b)(1)(F) requires the clerk's transcript to include the register of actions, if any. This provision is intended to assist the reviewing court in determining the accuracy of the clerk's transcript.

Subdivision (c). Under subdivision (c)(2), a clerk who sends a notice under subdivision (c)(1) must include a certificate stating the date on which the clerk sent it. This provision is intended to establish the date when the 10-day period for depositing the cost of the clerk's transcript under this rule begins to run.

~~**Advisory Committee Comment (2003)**~~

~~New subdivision (d)(2) is derived from former rule 19(a).~~

Advisory Committee Comment ~~(2002)~~ [version showing revisions]

Subdivision (a). ~~Revised subdivision (a)(1) fills a gap by adding cross-references to proceedings by stipulation under rule 5.2 and by agreed or settled statement under rule 6 or 7.~~

~~Former subdivision (a) recited that a notice designating the contents of a clerk's transcript may include "the clerk's minutes, any written opinion of the superior court, affidavits, and written instructions given or refused . . . ." (See also former rule 4.5.) Revised subdivision (a)(4) deletes this list: the list is misleading because it is incomplete, and it is surplusage to the extent it duplicates a later subdivision that prescribes the contents of the clerk's transcript (former subd. (d), revised subd. (b)). For the same reason, revised subdivision (a)(3) deletes the same list previously found in the provision authorizing a respondent to designate additional documents to be included in the clerk's transcript (former subd. (b)). The changes are not substantive.~~

~~Revised~~ Subdivision (a)(4) allows a party designating documents for inclusion in the clerk's transcript to specify *portions* of such documents that are not to be included, e.g., because they are duplicates of other designated documents or are not necessary for proper consideration of the issues raised in the appeal. The notice of designation should identify any portion to be omitted by means of a descriptive reference, e.g., by specific page or exhibit numbers. This provision is ~~a substantive change~~ intended to simplify and therefore expedite the preparation of the clerk's transcript, to reduce its cost to the parties, and to relieve the courts of the burden of reviewing a record containing redundant, irrelevant, or immaterial documents. ~~The revised rule is consistent in this respect with revised rules 4(a)(4) and 5.1(b)(2).~~

~~Former subdivision (a) provided that all exhibits "admitted in evidence or rejected" are deemed part of the clerk's transcript; revised subdivision (a)(5) fills a gap by adding *lodged* exhibits to that list. The change promotes the purpose of the provision.~~

~~Former rule 5 assumed that the superior court clerk had custody of all exhibits that the parties could designate for copying into the record. But other provisions of law (e.g., Code Civ. Proc., § 1952) authorize the superior court to return exhibits to parties. Revised subdivision (a)(5) fills this gap by requiring that the party with custody of any such exhibit promptly deliver it to the clerk if it is designated for copying into the clerk's transcript. The change is substantive. (See also revised rule 18(b)(2).)~~

Subdivision (b). ~~Revised subdivision (b)(1) lists the mandatory contents of the clerk's transcript. It is derived from the second paragraph of former subdivision (d), with the following changes:~~

~~1. Although the general definitional rule (rule 40) defines judgment to include appealable order, revised subdivision (b)(1)(C) of rule 5 adds an explicit reference to any *order* appealed from, to ensure that litigants and superior court clerks do not overlook the applicability of the rule to such orders.~~

~~2. Revised subdivision (b)(1)(D) fills a gap by adding references to a motion for judgment notwithstanding the verdict and for reconsideration of an appealed order, and any ruling thereon and any notice of its entry. The change is substantive.~~

~~3. Revised~~ Subdivision (b)(1)(F) ~~adds a reference to~~ requires the clerk's transcript to include the register of actions, if any. This provision is ~~a substantive change~~ intended to assist the reviewing court in determining the accuracy of the clerk's transcript.

~~4. Revised subdivision (b)(1) deletes as obsolete a former reference to "the pretrial [conference] order," a procedural step that was eliminated in 1985 (see now rule 209 et seq.).~~

~~Former subdivision (d) required that a judgment appealed from bear an "endorsement" showing the date that the clerk mailed, or a party served, notice of its entry. This date was necessary to determine the timeliness of an appeal under former rule 2, and included appeals from appealable orders (*id.*, subd. (d)). As explained more fully in the Advisory Committee Comment to revised rule 2, the requirement of showing that date has been moved to subdivision (a)(1) of revised rule 2, and has been expanded in subdivision (a)(2) of that rule to include the proof – and therefore the date – of service by a party of notice of entry (or a file-stamped copy) of the judgment, which triggers the running of the appeal time.~~

~~Former rule 5(d) omitted to require, however, that any dates appear on a notice of intention to move for a new trial, or on a motion to vacate the judgment or for judgment notwithstanding the verdict or for reconsideration of an appealed order, or on any ruling on such a motion and any notice of its entry. As explained more fully in the Advisory Committee Comment to revised rule 3, this gap has been filled by the addition of a new subdivision (f) to rule 3.~~

~~Revised subdivision (b)(2) incorporates by reference the date requirements of both of the foregoing rules, i.e., revised rules 2 and 3.~~

~~Revised subdivision (b)(3) lists the optional contents of the clerk's transcript. It is derived from the first sentence of the third paragraph of former subdivision (d). In revised subdivision (b)(3)(B), as in its predecessor, the word "exhibit" means documentary exhibit. Revised subdivision (b)(3) deletes as superfluous a former reference to the judgment roll, which is matter included in the broad category of "any other document filed or lodged in the case in superior court" under revised subdivision (b)(3)(A).~~

~~The second sentence of the third paragraph of former subdivision (d) required that for each written instruction designated for inclusion, the transcript also show which party requested it; any number~~

assigned to it; whether it was given or refused; if given, any modification made by the court; and if refused, any reason for refusal noted by the court. Revised subdivision (b)(3) deletes this requirement as surplusage, because the parties or the court customarily notes the information in question on the face of each instruction used at trial and subsequently copied by the clerk. (See also rule 229.) No substantive change is intended.

Revised subdivision (b)(4) is the second sentence of former subdivision (c).

Former subdivision (b). The substance of the first three sentences of former subdivision (b) is now found in revised subdivision (a)(3), (4), and (5).

The fourth and fifth sentences of former subdivision (b) related to deposit by the respondent of the estimated cost of copying exhibits into the record; they are deleted for reasons explained under Subdivision (c) of this Comment.

The sixth sentence of former subdivision (b) provided that instead of individual notices the parties could file a stipulation designating the contents of the transcript. The revised rule deletes this provision as an unnecessary formalism: if the parties do agree on the contents of the transcript, it is only necessary for the appellant to file its notice designating those contents; there is nothing for the respondent to counterdesignate, and no need for the parties to add yet another document—the stipulation—to the record. The change is substantive.

Subdivision (c). Revised subdivision (c)(1)(A) requires the clerk to send the appellant an estimate of the cost of preparing the entire clerk's transcript, i.e., the mandatory items listed in subdivision (b)(1) and all optional items listed in subdivision (b)(3); revised subdivision (c)(3) requires the appellant to make that deposit within 10 days. Former subdivision (c) imposed the same requirements, but carved out an exception for "exhibits and affidavits which the respondent has directed to be copied"; former subdivisions (b) and (e) required the clerk to send the respondent a separate estimate of the cost of copying such exhibits and required the respondent to make that deposit within 10 days (the former rule did not require the same notice and deposit for the cost of copying "affidavits").

This exception for a single item selected from among the many includable in the clerk's transcript—i.e., an exhibit that the appellant does not choose to designate but the respondent does—cannot reasonably be justified. If the purpose of the exception is to deter respondents from burdening appellants by designating unnecessary items, it proves too much: it cannot be assumed that respondents are more likely to designate unnecessary exhibits than they are to designate any other unnecessary documents, yet the initial cost of all such other documents is the responsibility of the appellant under both the former and revised versions of the rule. And the exception is unnecessary, because any abuse of the respondent's power to designate matter for inclusion in the clerk's transcript—whether an exhibit or any other document—is already subject to sanctions under the general provisions of rule 26. For these reasons, and to simplify the clerk's task in estimating the cost of the transcript, the revised rule eliminates the former exception for "exhibits and affidavits" designated by the respondent. The change is substantive.

Revised subdivision (c)(1) deletes the provision of former subdivision (c) requiring the clerk to estimate the cost of the transcript by the date the clerk receives "the reporter's estimate." The provision was made obsolete by 1991 changes in the method of determining the cost of a reporter's transcript.

~~Revised subdivision (c)(1) fills a gap by requiring the clerk to notify the appellant of the cost of a copy of the transcript for the appellant's use (in addition to the original for the reviewing court's use) and to notify each other party of the cost of a copy for that party's use. The change is substantive.~~

Under ~~revised~~ subdivision (c)(2), a clerk who sends a notice under subdivision (c)(1) must include a certificate stating the date on which the clerk sent it~~, analogous to the clerk's "certificate of mailing" currently in use in many superior courts~~. This provision is ~~a substantive change~~ intended to establish the date when the 10-day period for depositing the cost of the clerk's transcript under this rule begins to run.

~~As a substitute for depositing the cost of the clerk's transcript, revised subdivision (c)(3) permits a party to submit an application for, or an order granting, a waiver of that cost. This is a substantive change intended to alert indigent parties to the option of submitting such an application or order under rule 985 (see rule 985(i)(9)). (Compare revised rule 1(b)(1) [application or order under rule 985 instead of a filing fee for notice of appeal].)~~

~~**Subdivision (d).** Revised subdivision (d)(2) fills a gap by requiring the clerk to prepare additional copies of the transcript for which the parties have made deposits under revised subdivision (c)(1) and (3). The change is substantive.~~

~~**Former subdivision (e).** To the extent the first sentence of former subdivision (e) directed the clerk not to copy an exhibit unless designated by a party, it is deleted as superfluous because its directive is plainly implied by revised subdivision (a)(5). As noted above, the second sentence of former subdivision (e) is now revised subdivision (b)(4).~~

~~**Former subdivision (f).** The first sentence of former subdivision (f), up to the clause beginning, "but he may counterdesignate," has been moved to revised rule 4(a)(3). The substance of the remainder of the sentence, beginning with the just-quoted clause, is now found in revised subdivision (a)(4) and (5) of rule 5; its purported prohibition against a respondent's counterdesignating "instructions or exhibits" is deleted as contrary to both the former and revised versions of this rule (see, e.g., former subds. (a), (b), and (d); revised subds. (a)(4) and (5), (b)(3)(B) and (C)).~~

~~The second sentence of former subdivision (f) is deleted because it is superfluous insofar as it refers to the judgment roll and obsolete insofar as it refers to "the pretrial [conference] order."~~

~~The third sentence of former subdivision (f) has been moved to revised rule 4(a)(3).~~

Rule 8.124. ~~5.1.~~ Appendixes instead of clerk's transcript

(a) Notice of election

(1) Within 10 days after the notice of appeal is filed, any party electing to proceed by an appendix under this rule instead of by clerk's transcript under rule ~~5~~ 8.120 must serve and file a notice of election in superior court. The notice must state the date the notice of appeal was filed. This rule then governs unless the superior court orders otherwise on a motion served and filed within 10 days after the notice of election is served.

(2) A party may combine a notice of election with any notice designating a reporter's transcript under rule ~~4~~ 8.130(a)(1), and may combine both with the notice of appeal.

(3) When a party files a notice of election, the superior court clerk must promptly:

(A) Send a copy of the notice to the reviewing court~~,~~; and

(B) Send a copy of the register of actions, if any, to the attorney of record for each party and to any unrepresented party.

(4) The parties may prepare separate appendixes, but are encouraged to stipulate to a joint appendix.

(b) Contents of appendix

(1) A joint appendix or an appellant's appendix must contain:

(A) All items required by rule ~~5~~ 8.120(b)(1), showing the dates required by rule ~~5~~ 8.120(b)(2);

(B) Any item listed in rule ~~5~~ 8.120(b)(3) that is necessary for proper consideration of the issues, including, for an appellant's appendix, any item that the appellant should reasonably assume the respondent will rely on;

(C) The notice of election; and

(D) For a joint appendix, the stipulation designating its contents.

(2) An appendix must not contain documents or portions of documents filed in superior court that are unnecessary for proper consideration of the issues.

(3) An appendix must not contain transcripts of oral proceedings that may be designated under rule ~~4~~ 8.130.

(4) An appendix must not incorporate any document by reference except the record on appeal in another case pending in the reviewing court or the record in a prior appeal in the same case.

(5) All exhibits admitted in evidence or refused are deemed part of the appendix, whether or not it contains copies of them.

(6) A respondent's appendix may contain any document that could have been included in the appellant's appendix or a joint appendix.

(7) An appellant's reply appendix may contain any document that could have been included in the respondent's appendix.

(c) Exhibit held by other party

If a party preparing an appendix wants it to contain a copy of an exhibit in the possession of another party:

(1) The party must first ask the party possessing the exhibit to provide a copy or lend it for copying. All parties should reasonably cooperate with such requests.

(2) If the attempt under (1) is unsuccessful, the party may serve and file in the reviewing court a notice specifying the exhibit's trial court designation and requesting the party possessing the exhibit to deliver it to the requesting party or, if the possessing party prefers, to the reviewing court. The possessing party must comply with the request within 10 days after the notice was served.

(3) If the party possessing the exhibit sends it to the requesting party, that party must copy and return it to the possessing party within 10 days after receiving it.

(4) If the party possessing the exhibit sends it to the reviewing court, that party must:

(A) Accompany the exhibit with a copy of the notice served by the requesting party~~,~~; and

(B) Immediately notify the requesting party that it has sent the exhibit to the reviewing court.

(5) On request, the reviewing court may return an exhibit to the party that sent it. When the remittitur issues, the reviewing court must return all exhibits to the party that sent them.

(d) Form of appendix

(1) An appendix must comply with the requirements of rule ~~9~~ 8.144(a)~~–(c), (b), and (c)~~ for a clerk's transcript.

(2) In addition to the information required on the cover of a brief by rule ~~14~~ 8.204(b)(10), the cover of an appendix must prominently display the title "Joint Appendix" or "Appellant's Appendix" or "Respondent's Appendix" or "Appellant's Reply Appendix."

(3) An appendix must not be bound with a brief.

(e) Service and filing

(1) A party preparing an appendix must:

(A) Serve the appendix on each party, unless otherwise agreed by the parties or ordered by the reviewing court; and

(B) File the appendix in the reviewing court.

(2) A joint appendix or an appellant's appendix must be served and filed with the appellant's opening brief.

(3) A respondent's appendix, if any, must be served and filed with the respondent's brief.

(4) An appellant's reply appendix, if any, must be served and filed with the appellant's reply brief.

(f) Cost of appendix

(1) Each party must pay for its own appendix.

(2) The cost of a joint appendix must be paid:

(A) By the appellant;

(B) If there is more than one appellant, by the appellants equally; or

(C) As the parties may agree.

(g) Inaccurate or noncomplying appendix

Filing an appendix constitutes a representation that the appendix consists of accurate copies of documents in the superior court file. The reviewing court may impose monetary or other sanctions for filing an appendix that contains inaccurate copies or otherwise violates this rule.

Advisory Committee Comment [revised version]

Subdivision (a). Subdivision (a)(3)(B) is intended to assist appellate counsel in preparing an appendix by providing them with the list of pleadings and other filings found in the register of actions or "docket sheet" in those counties that maintain such registers. (See Gov. Code, § 69845.) The provision is derived from rule 10-1 of the United States Circuit Rules (9th Cir.).

Subdivision (b). Under subdivision (b)(1)(A), a joint appendix or an appellant's appendix must contain any register of actions that the clerk sent to the parties under subdivision (a)(3)(B). This provision is intended to assist the reviewing court in determining the accuracy of the appendix. The provision is derived from rule 30-1.3(a)(ii) of the United States Circuit Rules (9th Cir.).

In support of or opposition to pleadings or motions, the parties may have filed a number of lengthy documents in the proceedings in superior court, including, for example, declarations, points and authorities, trial briefs, documentary exhibits (e.g., insurance policies, contracts, deeds), and photocopies of judicial opinions or other publications. Subdivision (b)(2) prohibits the inclusion of such documents in an appendix when they are not necessary for proper consideration of the issues raised in the appeal. Even if a document is otherwise includable in an appendix, the rule prohibits the inclusion of any substantial *portion* of the document that is not necessary for proper consideration of the issues raised in the appeal. The prohibition is intended to simplify and therefore expedite the preparation of the appendix, to reduce its cost to the parties, and to relieve the courts of the burden of reviewing a record containing redundant, irrelevant, or immaterial documents. The provision is adapted from rule 30-1.4 of the United States Circuit Rules (9th Cir.).

Subdivision (b)(3) prohibits the inclusion in an appendix of transcripts of oral proceedings that may be made part of a reporter's transcript. (Compare rule 8.130(e)(3) [the reporter must not copy into the reporter's transcript any document includable in the clerk's transcript under rule 8.120].) The prohibition is intended to prevent a party filing an appendix from evading the requirements and safeguards imposed by rule 8.130 on the process of designating and preparing a reporter's transcript, or the requirements imposed by rule 8.144(d) on the use of daily or other transcripts instead of a reporter's transcript (i.e., renumbered pages, required indexes). In addition, if an appellant were to include in its appendix a transcript of less than all the proceedings, the respondent would not learn of any need to designate additional proceedings (under rule 8.130(a)(2)) until the appellant had served its appendix with its brief, when it would be too late to designate them. Note also that a party may file a certified transcript of designated proceedings instead of a deposit for the reporter's fee (rule 8.130(b)(3)).

Subdivision (d). In current practice, served copies of filed documents often bear no clerk's date stamp and are not conformed by the parties serving them. Consistently with this practice, subdivision (d) does not require such documents to be conformed. The provision thereby relieves the parties of the burden of obtaining conformed copies at the cost of considerable time and expense and expedites the preparation of the appendix and the processing of the appeal. It is to be noted, however, that under subdivision (b)(1)(A) each document necessary to determine the timeliness of the appeal must show the date required under rule 8.104 or 8.108. Note also that subdivision (g) of rule 8.124 provides that a party filing an appendix represents under penalty of sanctions that its copies of documents are accurate.

Subdivision (e). Subdivision (e)(2) requires a joint appendix to be filed with the appellant's opening brief. The provision is intended to improve the briefing process by enabling the appellant's opening brief to include citations to the record. To provide for the case in which a respondent concludes in light of the

appellant's opening brief that the joint appendix should have included additional documents, subdivision (b)(6) permits such a respondent to present in an appendix filed with its respondent's brief (see subd. (e)(3)) any document that could have been included in the joint appendix.

Under subdivision (e)(2)–(4) an appendix is required to be filed "with" the associated brief. This provision is intended to clarify that an extension of a briefing period ipso facto extends the filing period of an appendix associated with the brief.

Subdivision (g). Under subdivision (g), sanctions do not depend on the degree of culpability of the filing party—i.e., on whether the party's conduct was willful or negligent—but on the nature of the inaccuracies and the importance of the documents they affect.

Advisory Committee Comment ~~(2002)~~ [version showing revisions]

Subdivision (a). ~~Former subdivision (a) impliedly required the *party* filing a notice of election (to prepare an appendix) to serve a copy of that notice on the reviewing court. Revised subdivision (a)(3)(A) requires instead that the superior court *clerk* send a copy of that notice to the reviewing court. This substantive change makes the provision consistent with the similar rule requiring the clerk to send the reviewing court a copy of a party's notice to prepare (or to proceed without) a reporter's transcript. (Revised rule 4(d)(1).)~~

~~Revised~~ Subdivision (a)(3)(B) is ~~a substantive change~~ intended to assist appellate counsel in preparing an appendix by providing them with the list of pleadings and other filings found in the register of actions or "docket sheet" in those counties that maintain such registers. (See Gov. Code, § 69845.) The provision is derived from rule 10-1 of the United States Circuit Rules (9th Cir.).

~~Revised subdivision (a)(4) is derived from the first sentence of former subdivision (d).~~

Subdivision (b). ~~In former subdivision (b)(2) the standard for requiring inclusion of an item in an appendix was whether it was "essential" for proper consideration of the issues; revised subdivision (b)(1)(B) restates the standard as whether the item is "necessary" for the same purpose. The change is meant only to facilitate application of the standard; it is not intended to be substantive.~~

Under ~~revised~~ subdivision (b)(1)(A), a joint appendix or an appellant's appendix must contain any register of actions that the clerk sent to the parties under ~~revised~~ subdivision (a)(3)(B). This provision is ~~a substantive change~~ intended to assist the reviewing court in determining the accuracy of the appendix. The provision is derived from rule 30-1.3(a)(ii) of the United States Circuit Rules (9th Cir.).

~~Former subdivision (b)(4) required that an appendix contain "any motion opposed to proceeding under this rule," together with related papers and the trial court's order. Revised subdivision (b)(1) deletes the requirement as superfluous, because any issue raised by such a motion will have been resolved by the time the appendix is filed.~~

~~Revised subdivision (b)(1) deletes as surplusage the requirement of former subdivision (b)(6) that an appendix contain "required indices." The reference was to the alphabetical and chronological indexes required in a clerk's transcript under revised rule 9(b) (former rule 9(d)). The deleted provision is therefore redundant, because revised subdivision (c)(1) expressly requires an appendix to comply with rule 9(b).~~

~~Revised subdivision (b)(4) and (5) is former subdivision (c)(3). Revised subdivision (b)(6) is a portion of former subdivision (f).~~

~~Revised subdivision (b) adds the following three new provisions concerning the contents of an appendix:~~

~~1.~~ In support of or opposition to pleadings or motions, the parties may have filed a number of lengthy documents in the proceedings in superior court, including, for example, declarations, points and authorities, trial briefs, documentary exhibits (e.g., insurance policies, contracts, deeds), and photocopies of judicial opinions or other publications. ~~Revised~~ Subdivision (b)(2) prohibits the inclusion of such documents in an appendix when they are not necessary for proper consideration of the issues raised in the appeal. Even if a document is otherwise includable in an appendix, the ~~revised~~ rule prohibits the inclusion of any substantial *portion* of the document that is not necessary for proper consideration of the issues raised in the appeal. The prohibition is ~~a substantive change~~ intended to simplify and therefore expedite the preparation of the appendix, to reduce its cost to the parties, and to relieve the courts of the burden of reviewing a record containing redundant, irrelevant, or immaterial documents. The provision is adapted from rule 30-1.4 of the United States Circuit Rules (9th Cir.).

~~2. Revised~~ Subdivision (b)(3) prohibits the inclusion in an appendix of transcripts of oral proceedings that may be made part of a reporter's transcript. (Compare ~~revised~~ rule ~~4~~ 8.130(e)(3) [the reporter must not copy into the reporter's transcript any document includable in the clerk's transcript under rule ~~5~~ 8.120].) The prohibition is ~~a substantive change~~ intended to prevent a party filing an appendix from evading the requirements and safeguards imposed by ~~revised~~ rule ~~4~~ 8.130 on the process of designating and preparing a reporter's transcript, or the requirements imposed by ~~revised~~ rule ~~9~~ 8.144(d) on the use of daily or other transcripts instead of a reporter's transcript (i.e., renumbered pages, required indexes). In addition, if an appellant were to include in its appendix a transcript of less than all the proceedings, the respondent would not learn of any need to designate additional proceedings (under ~~revised~~ rule ~~4~~ 8.130(a)(2)) until the appellant had served its appendix with its brief, when it would be too late to designate them. Note also that a party may file a certified transcript of designated proceedings instead of a deposit for the reporter's fee (~~revised~~ rule ~~4~~ 8.130(b)(3)).

~~3. Revised subdivision (b)(7) fills a gap by prescribing the contents of an appellant's reply appendix.~~

Subdivision ~~(c)~~ (d). ~~Former subdivision (c)(1) required that any document not bearing a clerk's date stamp be conformed to show its filing date. Revised subdivision (c) deletes this requirement.~~ In current practice, served copies of filed documents often bear no clerk's date stamp and are not conformed by the parties serving them. ~~The elimination of this requirement is a substantive change intended to relieve~~ Consistently with this practice, subdivision (d) does not require such documents to be conformed. The provision thereby relieves the parties of the burden of obtaining conformed copies at the cost of considerable time and expense~~, thereby~~ and ~~expediting~~expedites the preparation of the appendix and the processing of the appeal. It is to be noted, however, that under ~~revised~~ subdivision (b)(1)(A) each document necessary to determine the timeliness of the appeal must show the date required under rule ~~2~~ 8.104 or ~~3~~ 8.108. Note also that ~~the revised rule (subd. (f)), like the former rule (former subd. (i)),~~ subdivision (g) of rule 8.124 provides that a party filing an appendix represents under penalty of sanctions that its copies of documents are accurate.

Subdivision ~~(d)~~ (e). ~~Revised subdivision (d)(1)(A) fills a gap by requiring that a copy of the appendix be served on each party unless otherwise agreed to by the parties or ordered by the court. The change is substantive.~~

~~Revised subdivision (d)(1)(B), requiring an appendix to be filed in the reviewing court, is former subdivision (c)(4).~~

~~Revised subdivision (d)(2) provides the same filing deadline for an appellant's appendix as former subdivision (e). But the revised subdivision provides a filing deadline for a *joint* appendix that is different from the deadline prescribed in former subdivision (d): rather than requiring that a joint appendix be filed no later than the filing of the *respondent's* brief, the revised s~~ Subdivision (e)(2) requires ~~it~~a joint appendix to be filed with the ~~*appellant's*~~appellant's opening brief. The ~~new deadline~~provision is ~~a substantive change~~ intended to improve the briefing process by enabling the appellant's opening brief to include citations to the record. To provide for the case in which a respondent concludes in light of the appellant's opening brief that the joint appendix should have included additional documents, ~~revised~~ subdivision (b)(6) permits such a respondent to present in an appendix filed with its respondent's brief (see ~~revised~~ subd. ~~(d)~~(e)(3)) any document that could have been included in the joint appendix.

Under ~~the former rule an appendix was required to be filed "no later than" the associated brief; under the revised rule (subd. (d)~~subdivision (e)(2)~~, (3), and~~ (4)~~)~~ an appendix is required to be filed "with" the associated brief. This provision is ~~a nonsubstantive change~~ intended to clarify that an extension of a briefing period ipso facto extends the filing period of an appendix associated with the brief.

~~Revised subdivision (d)(3) is a portion of former subdivision (f). Revised subdivision (d)(4) is former subdivision (g).~~

~~**Subdivision (e).** Revised subdivision (e), specifying the party liable for the initial cost of preparing an appendix, is former subdivision (h) without its last sentence, which provided that the "actual expense" of two copies of the appendix is "taxable as costs." The revised subdivision deletes that sentence as superfluous because its subject matter is covered in rule 26.~~

Subdivision ~~(f)~~ (g). Under ~~former subdivision (i)(1), the reviewing court could sanction a party for filing an appendix containing inaccurate copies of documents only if the filing was "[w]illful or grossly negligent." Revised subdivision (f) deletes the latter restriction because the burden imposed on the reviewing court and the nonfiling parties by the filing of an appendix containing inaccurate copies of documents does~~ subdivision (g), sanctions do not depend on the degree of culpability of the filing party—i.e., on whether the party's conduct was willful or negligent—but on the nature of the inaccuracies and the importance of the documents they affect. ~~The deletion is a substantive change.~~

~~The remainder of the former rule (former subd. (i)(2)) provided for the imposition of sanctions only for the improper *omission* of documents from an appendix, and authorized only monetary sanctions for that violation of the rule. The revised subdivision extends the reviewing court's sanction power to any act that "otherwise violates this rule," and authorizes sanctions other than monetary. This is a substantive change intended to recognize the authority of reviewing courts to promote compliance with the rule and their discretion to fashion sanctions commensurate with the egregiousness of any act of noncompliance.~~

Rule 8.128. ~~5.2.~~ Superior court file instead of clerk's transcript

(a) Stipulation; time to file

(1) If a local rule of the reviewing court permits, the parties may stipulate to use the original superior court file instead of a clerk's transcript under rule ~~5~~

8.120. This rule and any supplemental provisions of the local rule then govern unless the superior court orders otherwise after notice to the parties.

(2) Parties wanting to proceed under this rule must file their stipulation in superior court within 10 days after the filing of a notice of appeal. The parties must serve the reviewing court with a copy of the stipulation and of any notice designating a reporter's transcript.

(b) Cost estimate; preparation of file; transmittal

(1) Within 10 days after a stipulation under (a) is filed, the superior court clerk must mail the appellant an estimate of the cost to prepare the file, including the cost of sending the index under (3). The appellant must deposit the cost within 10 days after the clerk mails the estimate.

(2) Within 10 days after the appellant deposits the cost, the superior court clerk must put the superior court file in chronological order, number the pages, and attach a chronological index and a list of all attorneys of record, the parties they represent, and any unrepresented parties.

(3) The clerk must send copies of the index to all attorneys of record and any unrepresented parties for their use in paginating their copies of the file to conform to the index.

(4) The clerk must send the prepared file to the reviewing court with the reporter's transcript. If the appellant elected to proceed without a reporter's transcript, the clerk must immediately send the prepared file to the reviewing court.

~~**Advisory Committee Comment (2002)**~~

~~**Subdivision (a).** Former subdivision (a) provided that if the parties stipulated to using the superior court file instead of a clerk's transcript, this rule and any supplemental provisions of the relevant local rule would govern unless the superior court ordered otherwise on notice and "for good cause shown." Revised subdivision (a) deletes the quoted words as superfluous: it may be assumed the court will so order only for good cause.~~

~~**Subdivision (b).** Revised subdivision (b)(2) fills a gap by requiring the clerk to include unrepresented parties in the list of attorneys receiving copies of the index under revised subdivision (b)(3).~~

~~**Former subdivision (c).** Former subdivision (c) has been moved to revised rule 4(a)(3).~~

Rule 8.130. ~~4.~~ Reporter's transcript

(a) Notice

(1) Within 10 days after filing the notice of appeal, an appellant must serve and file in superior court either a notice designating a reporter's transcript or a notice of intent to proceed without a reporter's transcript, unless the appellant proceeds by agreed or settled statement under rule ~~6~~ 8.134 or ~~7~~ 8.137.

(2) If the appellant serves and files a notice designating a reporter's transcript, the respondent may, within 10 days after such service, serve and file a notice in superior court designating any additional proceedings the respondent wants included in the transcript.

(3) If the appellant elects to proceed without a reporter's transcript, the respondent cannot require that a reporter's transcript be prepared. But the reviewing court, on its own or the respondent's motion, may order the record augmented under rule ~~12~~ 8.155 to prevent a miscarriage of justice.

(4) A notice designating a reporter's transcript must state the date the notice of appeal was filed and specify the date of each proceeding to be included in the transcript, and may specify portions of designated proceedings that are not to be included.

(5) If the appellant designates less than all the testimony, the notice must state the points to be raised on appeal; the appeal is then limited to those points unless, on motion, the reviewing court permits otherwise.

(6) Any notice of designation must be served on each known reporter of the designated proceedings.

(b) Deposit or substitute for cost of transcript

(1) With its notice of designation, a party must deposit with the superior court clerk the approximate cost of transcribing the proceedings it designates, using either:

(A) The reporter's written estimate; or

(B) An amount calculated at $325 per fraction of the day's proceedings that did not exceed three hours, or $650 per day or fraction that exceeded three hours.

(2) If the reporter believes the deposit is inadequate, within 15 days after the clerk mails the notice under (d)(2) the reporter may file with the clerk and mail to

the designating party an estimate of the transcript's total cost, showing the additional deposit required. The party must deposit the additional sum within 10 days after the reporter mails the estimate.

(3) Instead of a deposit, the party may substitute the reporter's written waiver of a deposit, a copy of a Transcript Reimbursement Fund application filed under (c)(1), or a certified transcript of the designated proceedings. A reporter may waive the deposit for—and a party may submit a certified transcript of—a part of the designated proceedings, but such a waiver or transcript replaces the deposit for only that part.

(c) Transcript Reimbursement Fund application

(1) With its notice of designation, a party may serve and file a copy of its application to the Court Reporters Board for payment or reimbursement from the Transcript Reimbursement Fund under Business and Professions Code section 8030.2 et seq.

(2) If the Court Reporters Board approves the application for payment or reimbursement, the reporter's time to prepare the transcript under (f)(1) begins when the reporter receives notice of the approval.

(3) If the Court Reporters Board denies the application for payment or reimbursement, the party's time to deposit the reporter's fee or substitute under (b), or to file an agreed or settled statement under rule ~~6~~ 8.134 or ~~7~~ 8.137, is extended until 30 days after the board mails notice of the denial.

(d) Superior court clerk's duties

(1) The clerk must promptly send the reviewing court a copy of any notice filed under (a)(1).

(2) If a party designates proceedings to be included in a reporter's transcript and has presented the fee deposit or a substitute under (b)(3), the clerk must promptly mail the reporter notice of the designation and of the deposit or substitute. The notice must show the date it was mailed.

(3) If a party does not present the deposit or a substitute with its notice of designation, the clerk must file the notice and promptly issue a notice of default under rule ~~8~~ 8.140.

(4) The clerk must promptly notify the reporter if a check for a deposit is dishonored or an appeal is abandoned or is dismissed before the reporter has filed the transcript.

(e) Contents of transcript

(1) The reporter must transcribe all designated proceedings for which a certified transcript has not been substituted under (b)(3), and must note in the transcript where any proceedings were omitted and the nature of those proceedings. The reporter must also note where any exhibit was marked for identification and where it was admitted or refused, identifying such exhibits by number or letter.

(2) If a party designates a portion of a witness's testimony to be transcribed, the reporter must transcribe the witness's entire testimony unless the parties stipulate otherwise.

(3) The reporter must not copy any document includable in the clerk's transcript under rule ~~5~~ 8.120.

(f) Filing the transcript; copies; payment

(1) Within 30 days after notice is received under (c)(2) or mailed under (d)(2), the reporter must prepare and certify an original of the transcript and file it in superior court. The reporter must also file one copy of the original transcript, or more than one copy if multiple appellants equally share the cost of preparing the record (see rule ~~10~~ 8.147(a)(2)). Only the reviewing court can extend the time to prepare the reporter's transcript (see rule ~~45~~ 8.60).

(2) When the transcript is completed, the reporter must bill each designating party at the statutory rate and send a copy of the bill to the superior court clerk. The clerk must pay the reporter from that party's deposited funds and refund any excess deposit or notify the party of any additional funds needed. In a multiple reporter case, the clerk must pay each reporter who certifies under penalty of perjury that his or her transcript portion is completed.

(3) If the appeal is abandoned or is dismissed before the reporter has filed the transcript, the reporter must inform the superior court clerk of the cost of the portion of the transcript that the reporter has completed. The clerk must pay that amount to the reporter from the appellant's deposited funds and refund any excess deposit.

(4) On request, and unless the superior court orders otherwise, the reporter must provide any party with a copy of the reporter's transcript in computer-readable format.

(g) Agreed or settled statement when proceedings cannot be transcribed

(1) If any portion of the designated proceedings cannot be transcribed, the superior court clerk must so notify the designating party by mail; the notice must show the date it was mailed. The party may then substitute an agreed or settled statement for that portion of the designated proceedings by complying with either (A) or (B):

(A) Within 10 days after the notice is mailed, the party may file in superior court, under rule ~~6~~ 8.134, an agreed statement or a stipulation that the parties are attempting to agree on a statement. If the party files a stipulation, within 30 days thereafter the party must file the agreed statement, move to use a settled statement under rule ~~7~~ 8.137, or proceed without such a statement; or

(B) Within 10 days after the notice is mailed, the party may move in superior court to use a settled statement. If the court grants the motion, the statement must be served, filed, and settled as rule ~~7~~ 8.137 provides, but the order granting the motion must fix the times for doing so.

(2) If the agreed or settled statement contains all the oral proceedings, it will substitute for the reporter's transcript; if it contains a portion of the proceedings, it will be incorporated into that transcript.

(3) This remedy supplements any other available remedies.

Advisory Committee Comment [revised version]

Under rule 8.130 an appellant serves and files a notice *designating* a reporter's transcript (subd. (a)(1)) and the notice identifies the proceedings to be *included* (subd. (a)(4)). The wording recognizes that under rule 8.130(b)(3) the appellant, instead of depositing the reporter's cost to transcribe the proceedings, may substitute certified transcripts of proceedings that have already been transcribed (e.g., daily transcripts) and hence need only be designated for inclusion in the transcript.

Subdivision (a). Subdivision (a)(1) makes the filing of one of two notices—either to prepare a reporter's transcript or to proceed without one—an "act required to procure the record" within the meaning of rule 8.140(a). Under that rule, a failure to file such a notice triggers the clerk's duty to issue a 15-day notice of default and thereby allows the appellant to cure the default in superior court.

Subdivision (a)(4) requires that every notice designating a reporter's transcript identify which proceedings are to be included, and that it do so by specifying the date or dates on which those proceedings took place;

if the appellant does not want a portion of the proceedings on a given date to be included, the notice should identify that portion by means of a descriptive reference (e.g., "August 3, 2004, but not the proceedings on defendant's motion to tax costs").

As used in subdivision (a)(4), the phrase "oral proceedings" includes all instructions that the court gives, whether or not submitted in writing, and any instructions that counsel orally propose but the court refuses; all such instructions are included in the reporter's transcript if designated under this rule. All instructions that counsel submit in writing, whether or not given to the jury, are lodged with the superior court clerk and are included in the clerk's transcript if designated under rule 8.120.

Under subdivision (a), portions of depositions read in open court but not reported, or not read but lodged with the superior court clerk, are included in the clerk's transcript if designated under rule 8.120.

Subdivision (b). To eliminate any ambiguity, subdivision (b)(3) recognizes, first, that a party may substitute a waiver or a certified transcript for part of the designated proceedings and, second, that in such event the waiver or transcript replaces the deposit for only that part.

Subdivision (c). Under subdivision (c), an application to the Court Reporters Board for payment or reimbursement of the cost of the reporter's transcript from the Transcript Reimbursement Fund (Bus. & Prof. Code, § 8030.8) is a permissible substitute for the required deposit of the reporter's fee (subd. (b)(3)) and thereby prevents issuance of a notice of default (subd. (d)(4)).

Business and Professions Code sections 8030.6 and 8030.8 use the term "reimbursement" to mean not only a true reimbursement, i.e., repaying a party who has previously paid the reporter out of the party's own funds (see *id.*, § 8030.8, subd. (d)), but also a direct payment to a reporter who has not been previously paid by the party (see *id.*, § 8030.6, subds. (b) and (d)). Subdivision (f) recognizes this special dual meaning by consistently using the compound phrase, "payment or reimbursement."

Subdivision (d). Under subdivision (d)(2), the clerk's notice to the reporter must show the date on which the clerk mailed the notice. This provision is intended to establish the date when the period for preparing the reporter's transcript under subdivision (f)(1) begins to run.

Subdivision (e). Subdivision (e)(3) is not intended to relieve the reporter of the duty to report all oral proceedings, including the reading of instructions or other documents.

Subdivision (f). Subdivision (f)(1) requires the reporter to prepare and file additional copies of the record "if multiple appellants equally share the cost of preparing the record . . . ." The reason for the requirement is explained in the Comment to rule 8.147(a)(2).

Implementing statutory provisions (e.g., Code Civ. Proc., § 269, subd. (c); Gov. Code, § 69954), subdivision (f)(4) requires the reporter to provide a party, on request, with a copy of the reporter's transcript in computer-readable format. But in recognition of the fact that in some instances the reporter may be unable to provide a copy in that format, the subdivision also authorizes the reporter to apply to the superior court for relief from this requirement.

Advisory Committee Comment ~~(2002)~~

~~Revised rule 4 moves many of the provisions of former rule 4 into different subdivisions for reasons of logic and clarity. It also makes a number of substantive changes, including changes in the method of~~

~~determining the time within which a reporter or a party must take specified action. Under former rule 4, that time generally ran from the date the reporter or the party *received* a notice; except as provided in revised subdivision (c)(2), that time now runs from the date the notice is *mailed*. The changes are intended to provide certainty in fixing the time when a period begins and consistency with similar periods prescribed elsewhere in the rules (e.g., revised rules 2(a)(1) [time to file notice of appeal], 3(e)(1) [time to file notice of cross-appeal]).~~

~~Under former rule 4 an appellant wanting consideration of oral proceedings served and filed a notice to *prepare* a reporter's transcript, and the notice identified the proceedings to be *transcribed*.~~ Under ~~the revised~~ rule 8.130 ~~such~~ an appellant serves and files a notice *designating* a reporter's transcript (~~revised~~ subd. (a)(1))~~,~~ and the notice identifies the proceedings to be *included* (~~revised~~ subd. (a)(4)). The ~~broader~~ wording ~~better~~ recognizes that under ~~revised~~ rule ~~4~~ 8.130(b)(3) the appellant, instead of depositing the reporter's cost to transcribe the proceedings, may substitute certified transcripts of proceedings that have already been transcribed (e.g., daily transcripts) and hence need only be designated for inclusion in the transcript.~~ The revised wording is also consistent with the rule governing clerk's transcripts (rule 5).~~

Subdivision (a). ~~Revised~~ Subdivision (a)(1) ~~provides that within 10 days after filing the notice of appeal an appellant that does not want consideration of the oral proceedings must serve and file a notice of intent to proceed without a reporter's transcript. This is a substantive change intended to expedite preparation of the reporter's transcript. Under the former rule, the superior court clerk could not know whether an appellant's failure to timely file a notice designating a reporter's transcript evidenced a deliberate intent to proceed without such a transcript or a simple failure to comply with the 10-day time limit. In the latter case, therefore, the appellant was compelled to apply to the reviewing court for relief from default under rule 45. The revised rule in effect~~ makes the filing of one of two notices ~~or the other~~ —either to prepare ~~the~~a reporter's transcript or to proceed without ~~it~~one—an "act required to procure the record" within the meaning of ~~revised~~ rule ~~8~~ 8.140(a). Under that rule, a failure to file such a notice triggers the clerk's duty to issue a 15-day notice of default and thereby allows the appellant to cure the default in superior court.

~~Revised subdivision (a)(2) is the first sentence of the second paragraph of former subdivision (b).~~

~~Revised subdivision (a)(3) is former rule 5.1(j) (see also former rules 5(f) and 5.2(c)).~~

~~Revised~~ Subdivision (a)(4) requires that every notice designating a reporter's transcript identify which proceedings are to be included, and that it do so by specifying the date or dates on which those proceedings took place; if the appellant does not want a portion of the proceedings on a given date to be included, the notice should identify that portion by means of a descriptive reference (e.g., "August 3, 200~~0~~4, but not the proceedings on defendant's motion to tax costs"). ~~This is a substantive change intended to make the rule consistent with common practice, to promote uniformity, and to minimize uncertainty in the description of the proceedings to be transcribed.~~

~~Because of this change, the provisions of the first paragraph of former subdivision (b) authorizing partial transcripts by stipulation or designation are omitted as superseded. The provision of the same paragraph requiring the notice to state the points to be raised on appeal, and limiting the appeal to those points, is preserved in revised subdivision (a)(5) but restricted to cases in which the notice designates less than all the testimony (e.g., "August 3, 2000, but not the testimony of John Jones").~~

~~Revised subdivision (a)(6) restates the requirement of former subdivision (a) that the appellant serve its notice of designation on each known reporter, and fills a gap by requiring the same service by any respondent who designates additional proceedings under (a)(2).~~

~~The directive of former subdivision (a) that the appellant must serve "on the respondent" the notice designating the reporter's transcript is deleted: the notice must be served on all parties. The change fills an evident gap in the former rule.~~

~~Revised~~As used in subdivision (a)(4)~~,~~ ~~deletes as surplusage the provision of the first paragraph of former subdivision (a) requiring that the notice designating the reporter's transcript specify the instructions the appellant wants transcribed. T~~the phrase~~,~~ "oral proceedings~~,~~" includes all instructions that the court gives, whether or not submitted in writing, and any instructions that counsel orally propose but the court refuses; all such instructions are included in the reporter's transcript if designated under this rule. All instructions that counsel submit in writing, whether or not given to the jury, are lodged with the superior court clerk and are included in the clerk's transcript if designated under rule ~~5~~ 8.120.

~~The provisions of former subdivision (a) concerning a deposit for the cost of the transcript, a reporter's remedy if the deposit is inadequate, and substitutes for that deposit have been moved to a new subdivision (b) devoted to such matters.~~

~~The provisions of former subdivision (a) concerning the reporter's bill, the clerk's payment of that bill, and the manner of payment in multiple reporter cases have been moved to a new subdivision (f)(2) devoted to such matters.~~

~~Revised subdivisions (a) and (b) delete as surplusage the provisions of former subdivision (a) that required the appellant to accompany the fee deposit with "directions to the clerk" and required the reporter to "begin work on the transcript immediately" and "continue work on the transcript" until the deposit is earned or the time to make an additional deposit expires.~~

~~Because of the change discussed in the sixth paragraph of this Comment, revised subdivision (a) deletes as surplusage the provisions of the last paragraph of former subdivision (a) declaring that the proceedings to be transcribed do not include such matters as voir dire and opening statements unless specified in the notice.~~

~~Revised~~Under subdivision (a)~~. deletes the provision of the last paragraph of former subdivision (a) declaring that the proceedings to be transcribed include any portion of a deposition that was received into evidence or was offered and rejected. The provision is surplusage as to portions of depositions read in open court and reported, whether received into or excluded from evidence. P~~portions of depositions read in open court but not reported, or not read but lodged with the superior court clerk, are included in the clerk's transcript if designated under rule ~~5~~ 8.120.

~~Revised subdivision (a) deletes as surplusage the provision of the last paragraph of former subdivision (a) requiring the reporter to "indicate" any portions of depositions that are excluded from evidence and the objections thereto. That requirement is included in the reporter's general duty under revised subdivision (e)(1) to note in the transcript the place and nature of all "omitted . . . proceedings."~~

Subdivision (b). ~~Under former subdivision (a), the 10-day period for a reporter to request an additional deposit ran from the date the reporter received notice from the clerk of the amount deposited; under revised subdivision (b)(2), the period runs from the date the clerk mails that notice to the reporter. The purpose of this substantive change is discussed further in the first paragraph of this Comment.~~

To eliminate any ambiguity, ~~revised~~ subdivision (b)(3) recognizes, first, that a party may substitute a waiver or a certified transcript for part of the designated proceedings and, second, that in such event the waiver or transcript replaces the deposit for only that part.

~~**Former subdivision (b).** The first sentence of the second paragraph of former subdivision (b), authorizing the respondent to request inclusion of oral proceedings not specified in the appellant's notice, has been moved to new subdivision (a)(2). The second sentence of the same paragraph, concerning the respondent's deposit for the cost of such additional transcript, is covered by new subdivision (b)(1).~~

~~The provision of the last paragraph of former subdivision (b), declaring that if a party specifies that only a portion of a witness's testimony be transcribed the reporter must transcribe the witness's entire testimony unless the parties stipulate otherwise, has been moved to new subdivision (e)(2).~~

Subdivision (c). ~~Former subdivision (f) is revised subdivision (c).~~

~~Revised subdivision (c) deletes the provision of former subdivision (f)(1) that in effect required every party applying to the Court Reporters Board for payment or reimbursement from the Transcript Reimbursement Fund to first file a motion in superior court for permission to apply to that board. This is a substantive change. Because the superior court had no discretion to deny the motion if the party showed "probable eligibility" for payment or reimbursement (former subd. (f)(1)), and because the party is required to make the same showing to the Court Reporters Board in support of its application (Bus. & Prof. Code, § 8030.8), the superior court proceeding was in effect a preliminary screening process that served only the purpose of preventing issuance of a notice of default for failure to deposit the reporter's fee (see revised subd. (d)(4)). The same purpose is better served by a simplified procedure that expedites the process of obtaining a definitive ruling on the application from the only body empowered to make it — the Court Reporters Board itself — and thereby promotes the rule's ultimate goal of timely preparation of the reporter's transcript.~~

Under ~~the new, simplified procedure~~subdivision (c), ~~the party files its~~an application to the Court Reporters Board for payment or reimbursement of the cost of the reporter's transcript from the Transcript Reimbursement Fund (Bus. & Prof. Code, § 8030.8)~~, and serves and files a copy of that application at the same time as its notice designating the proceedings to be transcribed (revised subd. (c)(1)); the application~~ is a permissible substitute for the required deposit of the reporter's fee (~~revised~~ subd. (b)(3))~~,~~ and thereby prevents issuance of a notice of default (~~revised~~ subd. (d)(4)).

~~Business and Professions Code section 8030.2 et seq. does not require the Court Reporters Board to mail notice of its approval of an application for payment from the Transcript Reimbursement Fund to the reporter. Rather, it is the practice of the Board to notify only the applicant, and the applicant or the applicant's attorney presumably notifies the reporter. For this reason, revised subdivision (c)(2), like former rule 14(f), provides that the time for the reporter to prepare the transcript after such approval begins when the reporter receives — rather than when the Board mails — that notice. (See also revised subd. (f)(1).)~~

~~Revised subdivision (c)(3) removes an ambiguity in former subdivision (f)(1) by specifying that if the Court Reporters Board denies the application for payment or reimbursement, the party's time to deposit the reporter's fee or to file an agreed or settled statement is extended until 30 days after the Board mails notice of the denial.~~

~~The statute (Bus. & Prof. Code, §§~~ Business and Professions Code sections 8030.6~~,~~ and 8030.8~~)~~ use~~s~~ the term "reimbursement" to mean not only a true reimbursement, i.e., repaying a party who has previously paid the reporter out of the party's own funds (see *id.*, § 8030.8, subd. (d)), but also a direct payment to a reporter who has not been previously paid by the party (see *id.*, § 8030.6, subds. (b) and (d)). ~~Former s~~Subdivision (f) recognize~~d~~s this special dual meaning by consistently using the compound phrase, "payment or reimbursement."~~; revised subdivision (c) continues this practice.~~

~~Former subdivision (c).~~ ~~The first paragraph, and the first sentence of the last paragraph, of former subdivision (c) have been moved to revised subdivision (b)(3). The second sentence of the last paragraph is deleted as ambiguous and superfluous.~~

Subdivision (d). ~~Revised subdivision (d)(1) is new. This substantive change serves two purposes: it assists the reviewing court in monitoring the running of the time for preparing the record and in determining the time for filing an appellant's opening brief in an appeal presented on an appendix under rule 5.1 (see revised rule 15(a)(1)).~~

~~Revised subdivision (d)(2) preserves the requirement of the second paragraph of former subdivision (c) that the superior court clerk must promptly notify the reporter of the terms of any notice designating proceedings to be transcribed, and of any fee deposit. The revised subdivision deletes, however, the provision of the same paragraph of former subdivision (c) that required the clerk to deliver the notification to the reporter "personally or to his or her office or internal mail receptacle" and authorized the clerk to mail the notification if the reporter was not a court employee: the provision was inappropriate micromanagement of the clerk's office.~~

Under ~~revised~~ subdivision (d)(2), the clerk's notice to the reporter must show the date on which the clerk mailed the notice~~, analogously to the clerk's "certificate of mailing" currently in use in many superior courts~~. This provision is ~~a substantive change~~ intended to establish the date when the period for preparing the reporter's transcript under ~~revised~~ subdivision (f)(1) begins to run.

~~Revised subdivision (d)(3) incorporates a provision of the second paragraph of former subdivision (a) to expressly identify as a default the failure to present a fee deposit or its substitute. The former provision, however, required the clerk to mark such a notice of designation "received but not filed" and return it to the party. But a notice of designation may be, and often is, combined in the same document with a notice of appeal (revised rule 5(a)(2)), and the latter must be filed even if it is not accompanied by a fee or its substitute (revised rule 1(b)(3)). To avoid this complication, revised subdivision (d)(3) directs the clerk simply to file such a notice of designation and issue a notice of default. The clerk need not state the reason for the default on the face of the notice of designation, because the latter will be filed rather than returned to the party and the party will be notified of the reason for the default in the notice of default itself (revised rule 8(a) [the clerk must notify the party to perform "the act specified in the notice"]).~~

~~Revised subdivision (d)(4) is new. The provision fills a gap in the former rule and is a substantive change.~~

Subdivision (e). ~~Former subdivision (d) (sixth sentence) apparently required the reporter to note, for any instruction not submitted in writing, which party requested the instruction or whether it was given on the court's own motion, and any number assigned to it. Revised subdivision (e) deletes this requirement as unduly burdensome, because the reporter does not ordinarily have knowledge of the facts required to be noted. If any of those facts are orally recited by the court or a party during reported proceedings, of course, they will appear in the reporter's transcript.~~

~~Revised~~ Subdivision (e)(3)~~, like its predecessor, former subdivision (d) (last sentence), does not~~ is not intended to relieve the reporter of the duty to report all oral proceedings, including the reading of instructions or other documents.

Subdivision (f). ~~The first four sentences of former subdivision (d) are revised subdivision (f), with a new descriptive heading.~~

~~Former subdivision (d) provided that the reporter must file the transcript within 30 days "after notification by the clerk" that a party has designated proceedings to be transcribed. To the extent that the quoted phrase could be read to mean that the reporter's time to prepare the transcript began when the reporter received that notification, revised subdivision (f)(1) makes a substantive change, providing instead that the time begins when the clerk mails that notice under subdivision (d)(2). The purpose of this provision is discussed further in the first paragraph of this Comment.~~

~~Revised~~ Subdivision (f)(1) requires the reporter to prepare and file additional copies of the record "if multiple appellants equally share the cost of preparing the record . . . ." The reason for the requirement is explained in the ~~Advisory Committee~~ Comment to ~~revised~~ rule ~~10~~ 8.147(a)(2).

~~The provisions of revised subdivision (f)(3) and (4) are new; each provision fills a gap in the former rule and is a substantive change.~~ Implementing statutory provisions (e.g., Code Civ. Proc., § 269, subd. (c); Gov. Code, § 69954), ~~revised~~ subdivision (f)(4) requires the reporter to provide a party, on request, with a copy of the reporter's transcript in computer-readable format. But in recognition of the fact that in some instances the reporter may be unable to provide a copy in that format, the ~~revised~~ subdivision also authorizes the reporter to apply to the superior court for relief from this requirement.

~~The provision of former subdivision (d) requiring the reviewing court clerk to notify the parties of any extension of time to prepare the reporter's transcript is deleted as unnecessary because it is presumed the reviewing court gives the parties notice of its rulings.~~

~~The provision of former subdivision (d) concerning multiple reporter cases is replaced by a provision of the fifth paragraph of former subdivision (a) (now subd. (f)(2)) that deals more logically with the same matter.~~

~~Subdivision (g).~~ ~~Former subdivision (e), now revised subdivision (g), offered the option of proceeding by a settled statement when a portion of the designated proceedings cannot be transcribed. Revised subdivision (g) fills a gap by adding the option of proceeding by an agreed statement.~~

Rule 8.134. ~~6.~~ Agreed statement

(a) Contents of statement

(1) The record on appeal may consist wholly or partly of an agreed statement. The statement must explain the nature of the action, the basis of the reviewing court's jurisdiction, and how the superior court decided the points to be raised on appeal. The statement should recite only those facts needed to decide the appeal and must be signed by the parties.

(2) If the agreed statement replaces a clerk's transcript, the statement must be accompanied by copies of all items required by rule ~~5~~ 8.120(b)(1), showing the dates required by rule ~~5~~ 8.120(b)(2).

(3) The statement may be accompanied by copies of any document includable in the clerk's transcript under rule ~~5~~ 8.120(b)(3) and (4).

(b) Time to file; extension of time

(1) Within 10 days after filing the notice of appeal, an appellant wanting to proceed under this rule must file in superior court either an agreed statement or a stipulation that the parties are attempting to agree on a statement.

(2) If the appellant files the stipulation and the parties can agree on the statement, the appellant must file the statement within 40 days after filing the notice of appeal.

(3) If the appellant files the stipulation and the parties cannot agree on the statement, the appellant must file the notices provided for in rule ~~4, 5~~ 8.120, ~~or 5.1~~ 8.124, or 8.130, or the stipulation provided for in rule ~~5.2~~ 8.128, or a motion under rule ~~7~~ 8.137, within 50 days after filing the notice of appeal.

Advisory Committee Comment [revised version]

Subdivision (b). Subdivision (b)(1) requires the appellant to file, within 10 days after the notice of appeal is filed, either an agreed statement or a stipulation that the parties are attempting to agree on a statement. The provision is intended to prevent issuance of a notice of default while the parties are preparing an agreed statement.

Advisory Committee Comment ~~(2002)~~ [version showing revisions]

~~**Subdivision (a).** Revised subdivision (a)(2) deletes three items that former subdivision (a) required an agreed statement to contain: "the pretrial [conference] order," a procedural step that was eliminated in 1985 (see now rule 209 et seq.); the list of exhibits to be transmitted as originals, a topic dealt with in rule 18(a); and "a recital or résumé of any oral proceedings" on the listed posttrial motions, factual matter deemed unnecessary to the purposes of the paragraph.~~

~~Revised subdivision (a)(2) identifies the items that must accompany an agreed statement by cross-referencing the list of documents that a clerk's transcript must contain (revised rule 5(b)(1) and (2)). The cross-reference results in the inclusion of certain items not mentioned in former rule 6(a). This is a substantive change intended to promote completeness and consistency. (See revised rules 5.1(b)(1)(A), 7(b)(3).)~~

~~Revised subdivision (a)(3) identifies the optional items that may accompany an agreed statement by cross-referencing the list of items that a clerk's transcript may contain (revised rule 5(b)(3) and (4)). This is a substantive change intended to promote completeness and consistency. (See revised rule 7(b)(5).)~~

Subdivision (b). ~~Revised~~ Subdivision (b)(1) requires the appellant to file, within 10 days after the notice of appeal is filed, either an agreed statement or a stipulation that the parties are attempting to agree on a statement~~; the change is substantive and~~. The provision is intended to prevent issuance of a notice of default while the parties are preparing an agreed statement.

~~Former subdivision (a) required the appellant to file *two* copies of an agreed statement; revised subdivision (b)(1) requires only one copy, i.e., for the use of the reviewing court. Because all parties participate in preparing the agreed statement, it may be assumed that each will retain a copy for its own use.~~

Rule 8.137. ~~7.~~ Settled statement

(a) Motion to use settled statement

(1) Within 10 days after filing the notice of appeal, an appellant wanting to proceed under this rule must serve and file in superior court a motion to use a settled statement instead of a reporter's transcript or both reporter's and clerk's transcripts.

(2) The motion must be supported by a showing that:

(A) A substantial cost saving will result and the statement can be settled without significantly burdening opposing parties or the court;

(B) The designated oral proceedings were not reported or cannot be transcribed; or

(C) The appellant is unable to pay for a reporter's transcript and funds are not available from the Transcript Reimbursement Fund (see rule ~~4~~ 8.130(c)). A party proceeding in forma pauperis is deemed unable to pay for a transcript.

(3) If the court denies the motion, the appellant must file the notices provided for in rule ~~4, 5~~ 8.120, ~~or 5.1~~ 8.124, or 8.130, or the stipulation provided for in rule ~~5.2~~ 8.128, within 10 days after the superior court clerk mails, or a party serves, the order of denial.

(b) Time to file; contents of statement

(1) Within 30 days after the superior court clerk mails, or a party serves, an order granting a motion to use a settled statement, the appellant must serve and file in superior court a condensed narrative of the oral proceedings that the appellant believes necessary for the appeal. Subject to the court's approval in

settling the statement, the appellant may present some or all of the evidence by question and answer.

(2) If the condensed narrative describes less than all the testimony, the appellant must state the points to be raised on appeal; the appeal is then limited to those points unless, on motion, the reviewing court permits otherwise.

(3) An appellant wanting to use a settled statement instead of both reporter's and clerk's transcripts must accompany the condensed narrative with copies of all items required by rule ~~5~~ 8.120(b)(1), showing the dates required by rule ~~5~~ 8.120(b)(2).

(4) Within 20 days after the appellant serves the condensed narrative, the respondent may serve and file proposed amendments.

(5) The proposed statement and proposed amendments may be accompanied by copies of any document includable in the clerk's transcript under rule ~~5~~ 8.120(b)(3) and (4).

(c) Settlement, preparation, and certification

(1) The clerk must set a date for a settlement hearing by the trial judge that is no later than 10 days after the respondent files proposed amendments or the time to do so expires, whichever is earlier, and must give the parties at least five days' notice of the hearing date.

(2) At the hearing, the judge must settle the statement and fix the times within which the appellant must prepare, serve, and file it.

(3) If the respondent does not object to the prepared statement within five days after it is filed, it will be deemed properly prepared and the clerk must present it to the judge for certification.

(4) The parties' stipulation that the statement as originally served or as prepared is correct is equivalent to the judge's certification.

~~**Advisory Committee Comment (2002)**~~

~~**Subdivision (a).** Former subdivision (a) provided that an appellant could use a settled statement as a substitute for a normal record in order to achieve a substantial cost saving, "if allowed by the trial judge on noticed motion." The former subdivision provided no such procedure, however, for determining an appellant's right to use a settled statement on either of the other two grounds listed, i.e., inability to pay for a reporter's transcript or unavailability of such a transcript. To fill that gap, paragraphs (1) and (2) of revised subdivision (a) provide for a *motion to use a settled statement* on all three grounds listed; to fill an~~

~~additional gap, paragraph (3) of the same subdivision specifies what the appellant must do if the court denies the motion. These are substantive changes.~~

~~**Subdivision (b).** The new motion procedure of revised subdivision (a) makes superfluous the requirement of former subdivision (b) that an appellant file a *notice of motion* to use a settled statement; it is therefore omitted from revised subdivision (b).~~

~~Revised subdivision (b)(3) deletes as obsolete the requirement of former subdivision (c) that a proposed statement contain "the pretrial [conference] order." It deletes as superfluous the requirement of including all or part of the judgment roll, which is matter "includable in the clerk's transcript" under revised subdivision (b)(5).~~

~~Revised subdivision (b)(3) identifies the items that must accompany a proposed statement serving as a clerk's transcript by cross-referencing the list of documents that a clerk's transcript must contain (revised rule 5(b)(1) and (2)). The cross-reference results in the inclusion of certain items not mentioned in former rule 7(c). This is a substantive change intended to promote completeness and consistency. (See revised rules 5.1(b)(1)(A), 6(a)(2).)~~

~~Revised subdivision (b)(5) deletes the option of including in the proposed statement a list of exhibits the parties want transmitted as originals, a topic dealt with in rule 12(a). It also deletes the option of including "any instructions given or refused" (former subd. (b)); such an instruction will ordinarily be a "document includable in the clerk's transcript" under revised subdivision (b)(5).~~

~~Revised subdivision (b)(5) identifies the optional items that may accompany a proposed statement or a proposed amendment by cross-referencing the list of items that a clerk's transcript may contain (revised rule 5(b)(3) and (4)). This is a substantive change intended to promote completeness and consistency. (See revised rule 6(a)(3).)~~

~~Like the former rule, revised rule 7 requires the appellant to file only one copy of the settled statement, i.e., for the use of the reviewing court. Because all parties participate in preparing the settled statement, it may be assumed that each will retain a copy for its own use.~~

~~**Subdivision (c).** Former subdivision (d) required the trial judge to settle the statement at the time set by the clerk for the hearing, "or at the time to which the judge may continue the hearing . . . ." Revised subdivision (c)(2) deletes the quoted words as surplusage in light of the court's inherent power to continue a hearing for good cause; the deletion is not intended to deprive the court of that power.~~

Rule 8.140. ~~8.~~ Failure to procure the record

(a) Notice of default

If a party fails to timely do an act required to procure the record**,** the superior court clerk must promptly notify the party by mail that it must do the act specified in the notice within 15 days after the notice is mailed, and that failure to comply will result in one of the following sanctions:

(1) If the defaulting party is the appellant, the appeal will be dismissed; or

(2) If the defaulting party is the respondent, the appeal will proceed on the record designated by the appellant.

(b) Sanctions

If a party fails to comply with a notice given under (a), the superior court clerk must promptly notify the reviewing court of the default, and the reviewing court may impose one of the following sanctions:

(1) If the defaulting party is the appellant, the reviewing court may dismiss the appeal, but may vacate the dismissal for good cause; or

(2) If the defaulting party is the respondent, the reviewing court may order the appeal to proceed on the record designated by the appellant, but the respondent may obtain relief from default under rule ~~45~~ 8.60(d).

(c) Motion for sanctions

If the superior court clerk fails to give a notice required by (a), a party may serve and file a motion for sanctions under (b) in the reviewing court, but the motion must be denied if the defaulting party cures the default within 15 days after the motion is served.

Advisory Committee Comment [revised version]

Subdivision (a). In subdivision (a), the reference to a failure to "timely" do a required act is intended to include any valid extension of that time.

Advisory Committee Comment ~~(2002)~~ [version showing revisions]

~~Revised rule 8 is former rule 10(c). The provision is placed immediately after rules 4 through 7 in order to inform parties as soon as possible of the consequences of a default under any of those rules.~~

Subdivision (a). ~~Under the former rule (former rule 10(c), first paragraph), a default was the failure to do a required act within the time allowed "or within any valid extension of that time . . . ." In revised~~ subdivision (a), the reference to a failure to "timely" do a required act is intended to include any ~~such~~ valid extension of that time.

~~Revised subdivision (a)(2) addresses defaults by respondents, e.g., a respondent's failure to deposit the cost of transcribing proceedings that it had designated (see revised rule 4(b)(1)). This is a substantive change intended to fill a gap in the former rule, which addressed defaults by appellants only.~~

~~**Subdivision (b).** Revised subdivision (b)(1) recognizes that the reviewing court has discretion to dismiss an appeal for failure to cure a default under this rule, and to vacate that dismissal for good cause.~~

~~Revised subdivision (b)(2) recognizes that a respondent in default may nevertheless obtain relief on a showing of good cause under rule 45.~~

~~**Subdivision (c).** The former rule (former rule 10(c), first paragraph) provided that if the appellant failed to do a required act "and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed on motion of the respondent or on the reviewing court's own motion." The quoted language was made obsolete by the notice-of-default procedure and is therefore deleted. As a precaution, however, revised subdivision (c) authorizes a party to move for sanctions in the reviewing court if the superior court clerk fails to promptly give a notice required by subdivision (a), but the motion must be denied if the defaulting party cures the default within 15 days after the motion is served.~~

Rule 8.144. ~~9.~~ Form of the record

(a) Paper and format

(1) In the clerk's and reporter's transcripts:

(A) The paper must be white or unbleached, recycled, 8½ by 11 inches, and of at least 20-pound weight;

(B) The text must be reproduced as legibly as printed matter;

(C) The contents must be arranged chronologically;

(D) The pages must be consecutively numbered, except as provided in (e);

(E) The margin must be at least 1¼ inches on the bound edge of the page.

(2) In the clerk's transcript only one side of the paper may be used; in the reporter's transcript both sides may be used, but the margins must then be 1¼ inches on each edge.

(3) In the reporter's transcript the lines on each page must be consecutively numbered, and must be double-spaced or one-and-a-half-spaced; double-spaced means three lines to a vertical inch.

(b) Indexes

At the beginning of the first volume of each:

(1) The clerk's transcript must contain alphabetical and chronological indexes listing each document and the volume and page where it first appears;

(2) The reporter's transcript must contain alphabetical and chronological indexes listing the volume and page where each witness's direct, cross, and any other examination, begins; and

(3) The reporter's transcript must contain an index listing the volume and page where any exhibit is marked for identification and where it is admitted or refused.

(c) Binding and cover

(1) Clerk's and reporter's transcripts must be bound on the left margin in volumes of no more than 300 sheets.

(2) Each volume's cover, preferably of recycled stock, must state the title and trial court number of the case, the names of the trial court and each participating trial judge, the names and addresses of appellate counsel for each party, the volume number, and the inclusive page numbers of that volume.

(3) In addition to the information required by (2), the cover of each volume of the reporter's transcript must state the dates of the proceedings reported in that volume.

(d) Daily transcripts

Daily or other certified transcripts may be used for all or part of the reporter's transcript, but the pages must be renumbered consecutively and the required indexes and covers must be added.

(e) Pagination in multiple reporter cases

(1) In a multiple reporter case, each reporter must estimate the number of pages in each segment reported and inform the designated primary reporter of the estimate. The primary reporter must then assign beginning and ending page numbers for each segment.

(2) If a segment exceeds the assigned number of pages, the reporter must number the additional pages with the ending page number, a hyphen, and a new number, starting with 1 and continuing consecutively.

(3) If a segment has fewer than the assigned number of pages, the reporter must add a hyphen to the last page number used, followed by the segment's assigned ending page number, and state in parentheses "(next page number is ____)."

(f) Agreed or settled statements

Agreed or settled statements must conform with this rule insofar as practicable.

~~**Advisory Committee Comment (2002)**~~

~~**Subdivision (a).** Although former subdivision (a) applied only to clerk's transcripts, revised subdivision (a)(1) applies to both clerk's and reporter's transcripts; no reason appears to distinguish between them in the respects listed. Former subdivision (b), applicable primarily to reporter's transcripts, made provisions for such transcripts when they were either "typewritten" or "printed." These provisions have largely been made obsolete by the widespread use of word processing and computer printing, and are therefore omitted. Former subdivision (c) is omitted for the same reason.~~

~~Former subdivision (b) prescribed, for "typewritten" reporter's transcripts, that only one side of the paper may be used. That provision has also been made obsolete by computer printing, and revised subdivision (a)(2) therefore allows the option of using both sides of the paper for reporter's transcripts, as the rules allow for nontypewritten briefs. (See revised rule 14(b)(4).)~~

~~**Subdivision (b).** Revised subdivision (b) is derived from former subdivision (d).~~

~~**Subdivision (c).** Revised subdivision (c) is former subdivision (e). The requirement of revised subdivision (c)(2) that the cover of each volume of the clerk's and reporter's transcripts state the volume number and the inclusive page numbers of that volume, and the requirement of revised subdivision (c)(3) that the cover of each volume of the reporter's transcript state the dates of the proceedings reported in that volume, are substantive changes intended to facilitate the use of multivolume transcripts.~~

~~**Subdivision (d).** Revised subdivision (d) is the penultimate sentence of former subdivision (d).~~

~~**Subdivision (e).** Revised subdivision (e) is former subdivision (f).~~

~~**Subdivision (f).** Revised subdivision (f) is the last sentence of former subdivision (d).~~

Rule 8.147. ~~10.~~ Record in multiple or later appeals in same case

(a) Multiple appeals

(1) If more than one appeal is taken from the same judgment or a related order, only one record need be prepared, which must be filed within the time allowed for filing the record in the latest appeal.

(2) If there is more than one separately represented appellant, they must equally share the cost of preparing the record, unless otherwise agreed by the appellants or ordered by the superior court. Appellants equally sharing the cost are each entitled to a copy of the record.

(b) Later appeal

In an appeal under rule ~~4 or 5~~ 8.120 or 8.130:

(1) A party wanting to incorporate by reference parts of a record in a prior appeal in the same case must specify those parts in its designation of the record, with page numbers if available.

(2) A party wanting any incorporated parts of a prior record to be copied into the later record must serve and file a notice specifying those parts and must deposit the estimated copying cost within 10 days after the clerk mails notice of that cost.

Advisory Committee Comment [revised version]

Subdivision (a). Subdivision (a)(1) provides broadly for a single record whenever there are multiple appeals "from the same judgment or a related order." Multiple appeals from the *same judgment* include all cases in which opposing parties, or multiple parties on the same side of the case, appeal from the judgment. Multiple appeals from a judgment *and a related order* include all cases in which one party appeals from the judgment and another party appeals from any appealable order arising from or related to the judgment, i.e., not only orders contemplated by rule 8.108 (e.g., denying a motion for judgment notwithstanding the verdict) but also, for example, posttrial orders granting or denying attorney fees. The purpose is to encourage, when practicable, the preparation of a single record for all appeals taken in the same case. In specifying that "only one *record* need be prepared," of course, the rule does not depart from the basic requirement that an *original* and at least one *copy* of the record be prepared.

The second sentence of subdivision (a)(2) applies when multiple appellants equally share the cost of preparing the record and that cost includes the cost of a copy for each appellant. An appellant wanting the reporter to prepare an additional copy of the record—i.e., additional to the copy required by rule 8.130(f)(1)—must make a timely deposit adequate to cover the cost of that copy.

Advisory Committee Comment ~~(2002)~~

~~Revised rule 10 is former rule 11. Because the rule addresses preparation of the record in two special cases – multiple and successive appeals – it should logically be placed before former rule 10 (now revised rule 11), which deals with matters occurring when the record is complete.~~

Subdivision (a). ~~The former rule (former rule 11(a)) provided for a single record when there were multiple appeals from "the same judgment" or part thereof and when there was "a cross-appeal pursuant to rule 3." Revised~~ Subdivision (a)(1) ~~of rule 10~~ provides ~~more~~ broadly for a single record whenever there are multiple appeals "from the same judgment or a related order." Multiple appeals from the *same judgment* include all cases in which opposing parties, or multiple parties on the same side of the case, appeal from the judgment. Multiple appeals from a judgment *and a related order* include all cases in which one party appeals from the judgment and another party appeals from any appealable order arising from or related to the judgment, i.e., not only orders contemplated by rule ~~3~~ 8.108 (e.g., denying a motion for judgment notwithstanding the verdict) but also, for example, posttrial orders granting or denying attorney fees. ~~To the extent the revised wording is more inclusive, the change is substantive. Its~~ The

purpose is to encourage, when practicable, the preparation of a single record for all appeals taken in the same case.

In specifying that "only one *record* need be prepared," of course, the ~~revised~~ rule ~~—like the former rule—~~ does not depart from the basic requirement that an *original* and at least one *copy* of the record be prepared ~~(see, e.g., revised rules 4(f)(1) and 11(a)(1))~~.

~~Under both the former rule (former rule 11(a)) and revised rule 10(a)(2), multiple parties appealing from the same judgment must equally share the cost of preparing a single record unless the superior court orders otherwise; to fill a gap, the first sentence of revised subdivision (a)(2) recognizes that the *parties* may also agree otherwise. The former rule further omitted to provide that each of the multiple appellants is entitled to a copy of a record whose cost it shares.~~ The second sentence of ~~revised~~ subdivision (a)(2) ~~fills that gap; it~~ applies when multiple appellants equally share the cost of preparing the record and that cost includes the cost of a copy for each appellant. An appellant wanting the reporter to prepare an additional copy of the record—i.e., additional to the copy required by ~~revised~~ rule ~~4~~ 8.130(f)(1)—must make a timely deposit adequate to cover the cost of that copy.

~~The former rule required multiple parties to equally share the cost of preparing a single record regardless of the relationship between the parties. Revised rule 10(a)(2) imposes the burden of sharing the cost only on appellants that are separately represented. Each such appellant has a sufficient interest in the appeal to make it fair to require it to share the cost. This is a substantive change.~~

~~Revised subdivision (a) deletes as surplusage the directive of the former rule (former rule 11(a)) that the single record in multiple appeals "be prepared in accordance with rules 4 and 5 unless all appellants give notice of intention to proceed under rule 7, or unless the parties stipulate to proceed under rule 6." No substantive change is intended.~~

~~Revised subdivision (a)(2) deletes as unduly restrictive the adjective "initial" from the wording of the former rule (former rule 11(a)) that directed the appellants to bear equally "the *initial* expense of preparing the record." If the appellants are sharing a record they should share its full cost, subject to the superior court's power to order—or the parties' right to agree—otherwise in appropriate circumstances.~~

~~**Subdivision (b).** Revised subdivision (b)(1) authorizes a party to designate parts of a record in a prior appeal in the same case for incorporation by reference in the record in the later appeal. That authorization plainly implies the party's *power* to incorporate such matter by reference, and makes surplusage the express assertion of that power in the former provision on the subject (former rule 11(b), first sentence). The former provision also declared that the incorporated parts of the prior record need not be copied "unless the reviewing court so orders." This declaration is likewise surplusage, because the reviewing court does not draw its power to so order from the rule—it has the inherent power to do so. The deletion of this proviso from revised subdivision (b)(1) is thus not intended to be a substantive change.~~

~~The former rule (former rule 11(b), first paragraph) required the superior court clerk to prepare and insert in the record in the later appeal a "list and description" of the parts of the prior record designated for incorporation by reference, together with "specific references to the places in the prior record" where they could be found. Under revised subdivision (b)(1), these steps duplicate the primary responsibility of the *party* wanting incorporation by reference to "specify those parts in its designation of the record, with page numbers if available." Indeed, the party is better situated than the superior court clerk to know what those parts are and where they may be found. And if the party's designation is "specific" in this regard, as the revised rule requires, it will be adequate to inform opposing parties and the reviewing court of what~~

~~material is being incorporated and where it appears in the prior record. For all these reasons the revised rule relieves the clerk of this duty. It is a substantive change.~~

~~The former rule (former rule 11(b), first paragraph) also required the superior court clerk to place in the record "a notation of the clerk's office in which [the incorporated parts of the prior record] are filed." In current practice, however, a record in a prior appeal does not remain "filed" in the clerk's office in which it was originally filed, but instead is sent to storage in central archive facilities. The provision is therefore deleted as obsolete.~~

~~The former rule (former rule 11(b), first paragraph) provided that after the superior court clerk performed the duties discussed above, the material to be incorporated "shall thereupon be deemed incorporated in the subsequent record for all purposes." The provision is deleted because the revised rule relieves the clerk of such duties. Under the revised rule, the party's specific designation of the parts to be incorporated is sufficient to achieve incorporation.~~

~~The former rule (former rule 11(b), third paragraph) provided that on request of either party the reviewing court clerk was required to "make arrangements to obtain" the designated parts of the prior record "which may be lodged in another clerk's office or offices." As noted above, in current practice that record is not "lodged in another clerk's office" but is stored in a central archive. The provision is deleted both as obsolete and as inappropriate micromanagement of the reviewing court clerk's office.~~

Rule 8.150. ~~11.~~ Filing ~~and lending~~ the record

(a) ~~Filing the record~~ Superior court clerk's duties

~~(1)~~ When the record is complete, the superior court clerk must promptly send the original to the reviewing court and the copy to the appellant.

(b) Reviewing court clerk's duties

~~(2)~~ On ~~receipt~~ receiving the record, the reviewing court clerk must promptly file the original ~~record~~ and mail notice of the filing date to the parties.

~~(b) Lending the record~~

~~(1) If a party that has not purchased its own copy of the record asks to borrow another party's copy of the record within 20 days after the record is filed in the reviewing court, the other party must lend the record when it serves its brief.~~

~~(2) The borrowing party must return the copy of the record when it serves its brief or the time for filing the brief has expired.~~

~~(3) The borrowing party must bear the cost of sending the copy of the record to and from the borrowing party.~~

~~**Advisory Committee Comment (2002)**~~

~~Revised rule 11 is derived from former rule 10: revised subdivision (a) is former rule 10(b) and the first paragraph of former rule 10(e); revised subdivision (b) is the second paragraph of former rule 10(e).~~

~~The former rule (former rule 10(e), second paragraph) applied on its face only to a *respondent* that did not purchase its own copy of the record; revised rule 11(b)(1) fills a gap by extending the rule to any party that has not purchased its own copy.~~

~~Revised subdivision (b)(3) fills a gap by specifying that it is the borrowing party that must bear the cost of sending the copy of the record from the lending party to the borrowing party, and of returning it to the lending party.~~

~~The former rule (former rule 10(e), second paragraph) declared that "[t]he parties may stipulate" to use the appellant's copy of the record in a manner other than provided by the rule. Revised subdivision (b) deletes this declaration as surplusage: the parties do not need authority to agree on how to use their own property.~~

~~The former rule (former rule 10(e), third paragraph) provided that "[w]hen the judgment on appeal is final," the borrowed copy of the record must be returned to the party that paid for it. Revised subdivision (b) deletes this provision as irrelevant to the reason for the rule.~~

(Reviser's note: Former rule 11(b) is now rule 8.153.)

Rule 8.153. Lending the record

(a) Request

Within 20 days after the record is filed in the reviewing court, a party that has not purchased its own copy of the record may request another party, in writing, to lend it that party's copy of the record. The other party must then lend its copy of the record when it serves its brief.

(b) Time to return

The borrowing party must return the copy of the record when it serves its brief or the time to file its brief has expired.

(c) Cost

The borrowing party must bear the cost of sending the copy of the record to and from the borrowing party.

Rule 8.155. ~~12.~~ Augmenting and correcting the record

(a) Augmentation

(1) At any time, on motion of a party or its own motion, the reviewing court may order the record augmented to include:

(A) Any document filed or lodged in the case in superior court; or

(B) A certified transcript—or agreed or settled statement—of oral proceedings not designated under rule ~~4~~ 8.130.

(2) A party must attach to its motion a copy, if available, of any document or transcript that it wants added to the record. If the reviewing court grants the motion it may augment the record with the copy.

(3) If the party cannot attach a copy of the matter to be added, the party must identify it as required under rules ~~4 and 5~~ 8.120 and 8.130.

(b) Omissions

(1) If a clerk or reporter omits a required or designated portion of the record, a party may serve and file a notice in superior court specifying the omitted portion and requesting that it be prepared, certified, and sent to the reviewing court. The party must serve a copy of the notice on the reviewing court.

(2) The clerk or reporter must comply with a notice under (1) within 10 days after it is filed. If the clerk or reporter fails to comply, the party may serve and file a motion to augment under (a), attaching a copy of the notice.

(c) Corrections

(1) On motion of a party, on stipulation, or on its own motion, the reviewing court may order the correction or certification of any part of the record.

(2) The reviewing court may order the superior court to settle disputes about omissions or errors in the record.

(d) Notice

The reviewing court clerk must send all parties notice of the receipt and filing of any matter under this rule.

Advisory Committee Comment [revised version]

Subdivision (a). Subdivision (a)(1) makes it clear that a party may apply for—and the reviewing court may order—augmentation of the record at any time. Whether the motion is made within a reasonable time and is not for the purpose of delay, however, are among the factors the reviewing court may consider in ruling on such a motion.

Advisory Committee Comment ~~(2002)~~ [version showing revisions]

Subdivision (a). ~~Revised subdivision (a) is the first two paragraphs of former subdivision (a).~~

~~Former subdivision (a) allowed a party to request augmentation of the record by "suggestion." Revised subdivision (a) requires instead a formal motion to augment. This is a substantive change intended to bring order and predictability to the process of augmenting the record.~~

~~The foregoing change also makes superfluous the provisions of the former rule that (1) the requesting party must serve on the opposing party copies of the papers to be added to the record, (2) the opposing party may file an opposition to the request within 10 days, (3) in the absence of opposition the request will ordinarily be granted, and (4) the reviewing court clerk must mail a copy of the augmentation order to each party. These provisions are deleted from the revised rule, but the change is not substantive: the same requirements must be met under normal motion practice (see, e.g., rule 41).~~

~~Revised~~ Subdivision (a)(1) makes it clear that a party may apply for—and the reviewing court may order—augmentation of the record at any time. ~~This is not a substantive change: the former rule likewise imposed no time limit on requesting or granting augmentation.~~ Whether the motion ~~was~~is made within a reasonable time and ~~was~~is not for the purpose of delay, however, are among the factors the reviewing court may consider in ruling on such a motion.

~~Former subdivision (a) prescribed particular methods by which the reviewing court could accomplish augmentation, i.e., by ordering that documents in the superior court "be deemed filed, [and] be transmitted to it," or that portions of the oral proceedings "be transcribed, certified and transmitted to it," or that an agreed or settled statement "be prepared and transmitted to it." Revised subdivision (a)(1) deletes these provisions as unnecessary directives to the reviewing court; it is not intended to be a substantive change.~~

~~**Subdivision (b).** Revised subdivision (b) is the third paragraph of former subdivision (a).~~

Rule 8.160. ~~12.5.~~ Sealed records

(a) Application

This rule applies to sealed records and records proposed to be sealed on appeal and in original proceedings, but does not apply to records required to be kept confidential by law.

(b) Definitions

(1) "Record" means all or part of a document, paper, exhibit, transcript, or other thing filed or lodged with the court.

(2) A "sealed" record is a record closed to public inspection by court order.

(3) A "lodged" record is a record temporarily deposited with the court but not filed.

(c) Record sealed by the trial court

If a record sealed by the trial court is part of the record on appeal:

(1) The sealed record must be filed under seal in the reviewing court and remain sealed unless that court orders otherwise under (f).

(2) The record on appeal must include:

(A) The motion or application to seal;

(B) All documents filed in the trial court supporting or opposing the motion or application; and

(C) The order sealing the record.

(3) The reviewing court may examine the sealed record.

(d) Record not sealed by the trial court

A record filed or lodged publicly in the trial court and not ordered sealed by that court must not be filed under seal in the reviewing court.

(e) Record not filed in the trial court; motion or application to file under seal

(1) A record not filed in the trial court may be filed under seal in the reviewing court only by order of that court; it must not be filed under seal solely by stipulation or agreement of the parties.

(2) To obtain an order under (1), a party must serve and file a motion or application in the reviewing court, accompanied by a declaration containing facts sufficient to justify the sealing. At the same time, the party must lodge the record under (3), unless good cause is shown not to lodge it.

(3) To lodge a record, the party must put the record in an envelope or other appropriate container, seal it, and attach a cover sheet that complies with rule

~~44(d)~~ 8.40(c) and labels the contents as "CONDITIONALLY UNDER SEAL."

(4) If necessary to prevent disclosure, any motion or application, any opposition, and any supporting documents must be filed in a public redacted version and lodged in a complete version conditionally under seal. Unless the court orders otherwise, any party that already possesses copies of the records to be placed under seal must be served with a complete, unredacted version of all papers as well as a redacted version.

(5) On receiving a lodged record, the clerk must note the date of receipt on the cover sheet and retain but not file the record. The record must remain conditionally under seal pending determination of the motion or application.

(6) The court may order a record filed under seal only if it makes the findings required by rule ~~243.1~~ 2.550(d)–(e).

(7) If the court denies the motion or application, the clerk must not place the lodged record in the case file but must return it to the submitting party unless that party notifies the clerk in writing within 10 days after the order denying the motion or application that the record is to be filed.

(8) An order sealing the record must direct the sealing of only those documents and pages or, if reasonably practical, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.

(9) Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents of any materials that have been sealed in any subsequently filed records or papers.

(f) Unsealing a record in the reviewing court

(1) A sealed record must not be unsealed except ~~up~~on order of the reviewing court.

(2) Any person or entity may serve and file a motion, application, or petition in the reviewing court to unseal a record. If necessary to preserve confidentiality, the motion, application, or petition, any opposition, and any supporting documents must be filed in both a public redacted version and a sealed complete version.

(3) If the reviewing court proposes to order a record unsealed on its own motion, the court must mail notice to the parties. Any party may serve and file an opposition within 10 days after the notice is mailed or ~~within such time~~ as the court specifies. Any other party may file a response within 5 days after ~~the filing of~~ an opposition is filed.

(4) In determining whether to unseal a record, the court must consider the matters addressed in rule ~~243.1~~ 2.550(c)–(e).

(5) The order unsealing a record must state whether the record is unsealed entirely or in part. If the ~~court's~~ order unseals only part of the record or unseals the record only as to certain persons, the order must specify the particular records that are unsealed, the particular persons who may have access to the record, or both.

(6) If, in addition to the records in the sealed envelope or container, a court has previously ordered the sealing order, the register of actions, or any other court records relating to the case to be sealed, the unsealing order must state whether these additional records are unsealed.

(g) References to nonpublic material in public records prohibited

A record filed publicly in the reviewing court must not disclose material contained in a record that is sealed, lodged conditionally under seal, or otherwise subject to a pending motion to file under seal.

Advisory Committee Comment [revised version]

This rule and rules 2.550–2.551 for the trial courts provide a standard and procedures for courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. The sealed records rules apply to civil and criminal cases. They recognize the First Amendment right of access to documents used at trial or as a basis of adjudication. The rules do not apply to records that courts must keep confidential by law. Examples of confidential records to which public access is restricted by law are records of the family conciliation court (Fam. Code, § 1818, subd. (b)) and in forma pauperis applications (Cal. Rules of Court, rule 3.60.). Except as otherwise expressly provided in rule 8.160, motions in a reviewing court relating to the sealing or unsealing of a record must follow rule 8.54.

~~**Advisory Committee Comment (2002)**~~

~~Revised rule 12.5 restates former rule 12.5 to comply with the style of the revised rules. No substantive change is intended.~~

Advisory Committee Comment ~~(2000)~~ [version showing revisions]

This rule and rules ~~243.1–243.2~~ 2.550–2.551 for the trial courts provide a standard and procedures for courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. The sealed records rules apply to civil and criminal cases. They recognize the First Amendment right of access to documents used at trial or as a basis of adjudication. The rules do not apply to records that courts must keep confidential by law. Examples of confidential records to which public access is restricted by law are records of the family conciliation court (Fam. Code, § 1818, subd. (b)) and in forma pauperis applications (Cal. Rules of Court, rule ~~985(h)~~ 3.60). Except as otherwise expressly provided in rule ~~12.5~~ 8.160, motions in a reviewing court relating to the sealing or unsealing of a record must follow rule ~~41~~ 8.54.

Rule 8.163. ~~52.~~ Presumption from the record

The reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised. If the appeal proceeds without a reporter's transcript, this presumption applies only if the claimed error appears on the face of the record.

Advisory Committee Comment [revised version]

The intent of rule 8.163 is explained in the case law. (See, e.g., *Dumas v. Stark* (1961) 56 Cal.2d 673, 674.)

Advisory Committee Comment ~~(2005)~~ [version showing revisions]

~~Rule 52 has been simplified and restated to reflect its~~The intent ~~as~~of rule 8.163 is explained in the case law. (See, e.g., *Dumas v. Stark* (1961) 56 Cal.2d 673, 674.) ~~No substantive change is intended.~~

Article 3. Briefs in the Court of Appeal

Rule 8.200. ~~13.~~ Briefs by parties and amici curiae

(a) Parties' briefs

(1) Each appellant must serve and file an appellant's opening brief.

(2) Each respondent must serve and file a respondent's brief.

(3) Each appellant may serve and file a reply brief.

(4) No other brief may be filed except with the permission of the presiding justice, unless it qualifies under (b) or (c)(6).

(5) Instead of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal.

(b) Supplemental briefs after remand or transfer from Supreme Court

(1) Within 15 days after finality of a Supreme Court decision remanding or order transferring a cause to a Court of Appeal for further proceedings, any party may serve and file a supplemental opening brief in the Court of Appeal. Within 15 days after such a brief is filed, any opposing party may serve and file a supplemental responding brief.

(2) Supplemental briefs must be limited to matters arising after the previous Court of Appeal decision in the cause, unless the presiding justice permits briefing on other matters.

(3) Supplemental briefs may not be filed if the previous decision of the Court of Appeal was a denial of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause.

(c) Amicus curiae briefs

(1) Any person or entity may serve and file an application for permission of the presiding justice to file an amicus curiae brief.

(2) The application must state the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter.

(3) The proposed brief must be served and must accompany the application, and may be combined with it.

(4) The covers of the application and proposed brief must identify the party the applicant supports, if any.

(5) If the court grants the application, any party may file an answer within the time the court specifies. It must be served on all parties and the amicus curiae.

(6) The Attorney General may file an amicus curiae brief without the presiding justice's permission, unless the brief is submitted on behalf of another state officer or agency. The Attorney General must serve and file the brief within 14 days after the last respondent's brief is filed, and must provide the information required by (2) and comply with (4). Any party may serve and file an answer within 14 days after the brief is filed.

Advisory Committee Comment [revised version]

Subdivision (b). After the Supreme Court remands or transfers a cause to the Court of Appeal for further proceedings (i.e., under rules 8.328(c)–(e) or 10.1000(a)(1)(B)), the parties are permitted to file supplemental briefs. The first 15-day briefing period begins on the day of *finality* (under rule 8.332) of the Supreme Court decision remanding or order transferring the cause to the Court of Appeal. The rule specifies that "any party" may file a supplemental opening brief, and if such a brief is filed, "any opposing party" may file a supplemental responding brief. In this context the phrase "any party" is intended to mean any *or all* parties. Such a decision or order of transfer to the Court of Appeal thus triggers, first, a 15-day period in which any or all parties may file supplemental opening briefs and, second—if any party files such a brief—an additional 15-day period in which any opposing party may file a supplemental responding brief.

Advisory Committee Comment ~~(2003)~~ [version showing revisions]

~~New subdivision (b) is derived from former rule 29.4(f).~~

Subdivision (b). After the Supreme Court remands or transfers a cause to the Court of Appeal for further proceedings (i.e., under ~~revised~~ rules ~~29.3~~ 8.328(c)–(e)~~,~~ or ~~rule 47.1~~ 10.1000(a)(1)(B)), the parties are permitted to file supplemental briefs. ~~Former rule 29.4(f) authorized the parties to file only simultaneous supplemental briefs within a single 30-day period. In a substantive change intended to improve the usefulness of such briefing to the Court of Appeal, revised rule 13(b) authorizes instead two consecutive briefing periods of 15 days each. The revised rule makes clear that~~ The first 15-day briefing period begins on the day of *finality* (under ~~revised~~ rule ~~29.4~~ 8.332) of the Supreme Court decision remanding or order transferring the cause to the Court of Appeal. ~~Moreover,~~ The ~~revised~~ rule specifies that "any party" may file a supplemental opening brief, and if such a brief is filed, "any opposing party" may file a supplemental responding brief. In this context the phrase "any party" is intended to mean any *or all* parties. ~~Under the revised rule, therefore,~~ Such a decision or order of transfer to the Court of Appeal thus triggers, first, a 15-day period in which any or all parties may file supplemental opening briefs and, second—if any party files such a brief—an additional 15-day period in which any opposing party may file a supplemental responding brief.

~~**Advisory Committee Comment (2002)**~~

~~Revised rule 13 governs briefs—of the parties or amici curiae—in the Court of Appeal only; rule 29.3 governs briefs in the Supreme Court.~~

~~**Subdivision (a).** Revised subdivision (a) combines former rule 14(a) with the first sentence of the first paragraph of former rule 13. The remainder of that rule has been moved to revised rule 14(a)(2).~~

~~**Subdivision (c).** Revised subdivision (c) is former rule 14(c). Revised subdivision (c)(2) states the showing required of a prospective amicus curiae in terms somewhat different from those of former rule 14(c), but no substantive change is intended.~~

~~Revised subdivision (c)(3) conforms amicus curiae practice in the Court of Appeal with amicus curiae practice in the Supreme Court by requiring that the application for permission to file an amicus curiae brief be accompanied by the proposed brief. The change is substantive, and is intended to expedite the briefing process.~~

~~Revised subdivision (c)(6) is new. It incorporates the substance of the amendment to former rule 14(c) effective July 1, 2000.~~

Rule 8.204. ~~14.~~ Contents and form of briefs

(a) Contents

(1) Each brief must:

(A) Begin with a table of contents and a table of authorities separately listing cases, constitutions, statutes, court rules, and other authorities cited;

(B) State each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority; and

(C) Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears. If any part of the record is submitted in electronic format, citations to that part must identify, with the same specificity required for the printed record, the place in the record where the matter appears.

(2) An appellant's opening brief must:

(A) State the nature of the action, the relief sought in the trial court, and the judgment or order appealed from;

(B) State that the judgment appealed from is final, or explain why the order appealed from is appealable; and

(C) Provide a summary of the significant facts limited to matters in the record.

(b) Form

(1) A brief may be reproduced by any process that produces a clear, black image of letter quality. The paper must be white or unbleached, recycled, 8½ by 11 inches, and of at least 20-pound weight.

(2) Any conventional typeface may be used. The typeface may be either proportionally spaced or monospaced.

(3) The type style must be roman; but for emphasis, italics or boldface may be used~~,~~ or the text may be underscored. Case names must be italicized or underscored. Headings may be in uppercase letters.

(4) Except as provided in (11), the type size, including footnotes, must not be smaller than 13-point, and both sides of the paper may be used.

(5) The lines of text must be unnumbered and at least one-and-a-half-spaced. Headings and footnotes may be single-spaced. Quotations may be block-indented and single-spaced. Single-spaced means six lines to a vertical inch.

(6) The margins must be at least 1½ inches on the left and right and 1 inch on the top and bottom.

(7) The pages must be consecutively numbered. The tables and the body of the brief may have different numbering systems.

(8) The brief must be bound on the left margin. If the brief is stapled, the bound edge and staples must be covered with tape.

(9) The brief need not be signed.

(10) The cover, preferably of recycled stock, must be in the color prescribed by rule ~~44(c)~~ 8.40(b) and must state:

(A) The title of the brief;

(B) The title, trial court number, and Court of Appeal number of the case;

(C) The names of the trial court and each participating trial judge;

(D) The name, address, telephone number, and California State Bar number of each attorney filing or joining in the brief, but the cover need not state the bar number of any supervisor of the attorney responsible for the brief; and

(E) The name of the party that each attorney on the brief represents.

(11) If the brief is produced on a typewriter:

(A) A typewritten original and carbon copies may be filed only with the presiding justice's permission, which will ordinarily be given only to unrepresented parties proceeding in forma pauperis. All other typewritten briefs must be filed as photocopies.

(B) Both sides of the paper may be used if a photocopy is filed; only one side may be used if a typewritten original and carbon copies are filed.

(C) The type size, including footnotes, must not be smaller than standard pica, 10 characters per inch. Unrepresented incarcerated litigants may use elite type, 12 characters per inch, if they lack access to a typewriter with larger characters.

(c) Length

(1) A brief produced on a computer must not exceed 14,000 words, including footnotes. Such a brief must include a certificate by appellate counsel or an unrepresented party stating the number of words in the brief. The person certifying may rely on the word count of the computer program used to prepare the brief.

(2) A brief produced on a typewriter must not exceed 50 pages.

(3) The tables, a certificate under (1), and any attachment under (d) are excluded from the limits stated in (1) or (2).

(4) A combined brief in an appeal governed by rule ~~16~~ 8.216 must not exceed double the limits stated in (1) or (2).

(5) On application, the presiding justice may permit a longer brief for good cause.

(d) Attachment to briefs

A party filing a brief may attach copies of exhibits or other materials in the appellate record. The attachment must not exceed a total of 10 pages, but on application the presiding justice may permit a longer attachment for good cause.

(e) Noncomplying briefs

If a brief does not comply with this rule:

(1) The reviewing court clerk may decline to file it, but must mark it "received but not filed" and return it to the party; or

(2) If the brief is filed, the reviewing court may, on its own or a party's motion, with or without notice:

(A) Order the brief returned for corrections and refiling within a specified time;

(B) Strike the brief with leave to file a new brief within a specified time; or

(C) Disregard the noncompliance.

Advisory Committee Comment [revised version]

Subdivision (b). The first sentence of subdivision (b)(1) confirms that any method of reproduction is acceptable provided it results in a clear black image of letter quality. The provision is derived from subdivision (a)(1) of rule 32 of the Federal Rules of Appellate Procedure (28 U.S.C.) (FRAP 32).

Paragraphs (2), (3), and (4) of subdivision (b) state requirements of *typeface*, *type style*, and *type size* (see also subd. (b)(11)(C)). The first two terms are defined in *The Chicago Manual of Style* (15th ed., 2003) p. 839. Note that computer programs often refer to typeface as "font."

Subdivision (b)(2) allows the use of any conventional typeface—e.g., Times New Roman, Courier, Arial, Helvetica, etc.—and permits the typeface to be either proportionally spaced or monospaced.

Subdivision (b)(3) requires the type style to be roman, but permits the use of italics, boldface, or underscoring for emphasis; it also requires case names to be italicized or underscored. These provisions are derived from FRAP 32(a)(6).

Subdivision (b)(5) allows headings to be single-spaced; it is derived from FRAP 32(a)(4). The provision also permits quotations of any length to be block-indented and single-spaced at the discretion of the brief writer.

Brief writers are encouraged to follow the citation form of the *California Style Manual* (4th ed., 2000).

Subdivision (c). Subdivision (c) governs the maximum permissible length of a brief. It is derived from the federal procedure of measuring the length of a brief produced on a computer by the number of words in the brief. (FRAP 32(a)(7).) Subdivision (c)(1), like FRAP 32(a)(7)(B)(i), imposes a limit of 14,000 words if the brief is produced on a computer. Subdivision (c)(1) implements this provision by requiring the writer of a brief produced on a computer to include a certificate stating the number of words in the brief, but allows the writer to rely on the word count of the computer program used to prepare the brief. This requirement, too, is adapted from the federal rule. (FRAP 32(a)(7)(C).) For purposes of this rule, a "brief produced on a computer" includes a commercially printed brief.

Subdivision (c)(5) clarifies that a party seeking permission to exceed the page or word limits stated in subdivision (c)(1) and (2) must proceed by application under rule 8.50 rather than by motion under rule 8.54, and must show good cause.

Subdivision (d). Subdivision (d) permits a party filing a brief to attach copies of exhibits or other materials, provided they are part of the record on appeal and do not exceed a total of 10 pages. If the brief writer attaches, under rule 8.985(c), a copy of an unpublished opinion or an opinion available only in computerized form, that opinion does not count toward the 10-page limit stated in subdivision (d) of rule 8.204.

Subdivision (e). Subdivision (e) states the consequences of submitting briefs that do not comply with this rule: subdivision (e)(1) recognizes the power of the reviewing court clerk to decline to file such a brief, and subdivision (e)(2) recognizes steps the reviewing court may take to obtain a brief that does comply with the rule. Subdivision (e)(2) does not purport to limit the inherent power of the reviewing court to fashion other sanctions for such noncompliance.

Advisory Committee Comment ~~(2002)~~ [version showing revisions]

~~**Subdivision (a).** Revised subdivision (a)(1) is former rule 15(a); revised subdivision (a)(2) restates portions of former rule 13. No substantive change is intended.~~

Subdivision (b). ~~Revised subdivision (b) combines and simplifies subdivisions (b) through (d) of former rule 15. No substantive changes are intended, with the following exceptions:~~

The first sentence of ~~revised~~ subdivision (b)(1) confirms that any method of reproduction is acceptable provided it results in a clear black image of letter quality. The provision is derived from subdivision (a)(1) of rule 32 of the Federal Rules of Appellate Procedure (28 U.S.C.) (hereafter FRAP 32). ~~Although the revised subdivision omits the dot matrix printing specifications stated in the former rule (former rule 15(b)(5)) as unnecessary micromanagement, it is not intended to prohibit the use of that printing method.~~

Paragraphs (2), (3), and (4) of ~~revised~~ subdivision (b) state requirements of *typeface*, *type style*, and *type size* (see also subd. (b)(11)(C)). The~~se~~ first two terms are defined in *The Chicago Manual of Style* (15th ed., 2003) p~~p~~. ~~856–857~~ 839. Note that computer programs often refer to typeface as "font."

~~Revised~~ Subdivision (b)(2) allows the use of any conventional typeface—e.g., Times New Roman, Courier, Arial, Helvetica, etc.—and permits the typeface to be either proportionally spaced or monospaced. ~~The latter provision is derived from former rule 15(b).~~

~~Revised~~ Subdivision (b)(3) requires the type style to be roman, but permits the use of italics, boldface, or underscoring for emphasis; it also requires case names to be italicized or underscored. These provisions are derived from FRAP 32(a)(6).

~~Revised~~ Subdivision (b)(5) allows headings to be single-spaced; it is derived from FRAP 32(a)(4). The ~~revised~~ provision also permits quotations of any length to be block-indented and single-spaced at the discretion of the brief writer.

~~Revised subdivision (b)(6) simplifies the margin requirements by providing a uniform margin size regardless of how the brief is produced. The benefits of uniformity are deemed to outweigh any reason for the former small differences in margin sizes. (Former rule 15(c)(5) and (d)(3).)~~

~~Reflecting current practice, revised subdivision (b)(9) clarifies that the party or the attorney for the party need not sign the brief. The change is not substantive.~~

~~Reflecting current practice, revised subdivision (b)(10)(E) requires that the cover of a brief state the name of each *party* represented by each attorney filing or joining in the brief. The change is not substantive.~~

~~Revised subdivision (b)(10)(F) is former rule 15(h) (eff. July 1, 2000).~~

Brief writers are encouraged to follow the citation form of the *California Style Manual* (4th ed., 2000).

Subdivision (c). ~~Revised~~ Subdivision (c) governs the maximum permissible length of a brief~~,~~. ~~and makes a substantive change~~ It is derived from the federal procedure of measuring the length of a brief produced on a computer by the number of words in the brief. (FRAP 32(a)(7).) ~~Thus revised~~ Subdivision (c)(1), like FRAP 32(a)(7)(B)(i), imposes a limit of 14,000 words if the brief is produced on a computer. ~~If the brief is produced on a typewriter, revised subdivision (c)(2) continues the former limit of 50 pages. (See former rule 15(e).) Given the requirements of minimum type size (subd. (b)(4)) and minimum margin size (subd. (b)(6)), a limit of 14,000 words is the approximate equivalent of a limit of 50 pages. Revised~~ Subdivision (c)(1) implements this provision by requiring the writer of a brief produced on a computer to include a certificate stating the number of words in the brief, but allows the writer to rely on the word count of the computer program used to prepare the brief. This requirement, too, is adapted from the federal rule. (FRAP 32(a)(7)(C).) For purposes of this rule, a "brief produced on a computer" includes a commercially printed brief.

~~Revised subdivision (c)(4) clarifies that a combined brief in an appeal governed by revised rule 16 may cumulate the word or page limits stated in subdivision (c)(1) and (2).~~

~~Revised~~ Subdivision (c)(5) clarifies that a party seeking permission to exceed the page or word limits stated in subdivision (c)(1) and (2) must proceed by application under rule ~~43~~ 8.50 rather than by motion under rule ~~41~~ 8.54, and must show good cause.

Subdivision (d). ~~Revised subdivision (d) is new. It~~ Subdivision (d) permits a party filing a brief to attach copies of exhibits or other materials, provided they are part of the record on appeal and do not exceed a total of 10 pages. ~~(Compare rule 28(e)(6)(iv) [permissible attachments to petition for Supreme Court review].) This is a substantive change intended to improve the appellate process by allowing the brief writer, in appropriate cases, to focus the reviewing court's attention on especially significant or explanatory exhibits or other documents, and by relieving the court of the burden of finding those items in a lengthy record.~~ If the brief writer attaches, under rule ~~977~~ 8.985(c), a copy of an unpublished opinion or an opinion available only in computerized form, that opinion does not count toward the 10-page limit stated in ~~revised~~ subdivision (d) of rule ~~14~~ 8.204.

Subdivision (e). ~~Revised~~ Subdivision (e) ~~combines in one rule disparate provisions that discuss~~ states the consequences of submitting briefs that do not comply with this rule: ~~revised~~ subdivision (e)(1) recognizes the power of the reviewing court clerk to decline to file such a brief ~~(see former rule 15(f))~~, and ~~revised~~ subdivision (e)(2) recognizes steps the reviewing court may take to obtain a brief that does comply with the rule ~~(see former rule 18)~~. ~~Revised~~ Subdivision (e)(2) does not purport to limit the inherent power of the reviewing court to fashion other sanctions for such noncompliance.

Rule 8.208. Certificate of financially interested entities [reserved]

Rule 8.212. ~~15.~~ Service and filing of briefs

(a) Time to file

(1) An appellant must serve and file its opening brief within:

(A) 30 days after the record—or the reporter's transcript, after a rule ~~5.1~~ 8.124 election—is filed in the reviewing court; or

(B) 70 days after the filing of a rule ~~5.1~~ 8.124 election, if the appeal proceeds without a reporter's transcript.

(2) A respondent must serve and file its brief within 30 days after the appellant files its opening brief.

(3) An appellant must serve and file its reply brief, if any, within 20 days after the respondent files its brief.

(b) Extensions of time

(1) The parties may extend each period under (a) by up to 60 days by filing one or more stipulations in the reviewing court before the brief is due. Stipulations must be signed by and served on all parties. The original signature of at least one party must appear on the stipulation filed in the reviewing court; the signatures of the other parties may be in the form of fax copies of the signed signature page of the stipulation.

(2) A stipulation under (1) is effective on filing. The reviewing court may not shorten a stipulated extension.

~~(2)~~ (3) Before the brief is due, a party may apply to the presiding justice for an extension of each period under (a), or under rule ~~13(e)~~ 8.200(c)(5) or (6), on a showing that there is good cause and that:

(A) The applicant was unable to obtain—or it would have been futile to seek—the extension by stipulation; or

(B) The parties have stipulated to the maximum extension permitted under (1) and the applicant seeks a further extension.

~~(3)~~ (4) A party need not apply for an extension or relief from default if it can file its brief within the time prescribed by rule ~~17~~ 8.220. The clerk must file a brief submitted within that time if it otherwise complies with these rules.

(c) Service

(1) A copy of each brief must be served on the superior court clerk for delivery to the trial judge.

(2) Four copies of each brief filed in a civil appeal must be served on the Supreme Court. If the Court of Appeal has ordered the brief sealed:

(A) The party serving the brief must place all four copies of the brief in a sealed envelope and attach a cover sheet that contains the information required by rule 8.204(b)(10) and labels the contents as "CONDITIONALLY UNDER SEAL~~,~~"; and

(B) The Court of Appeal clerk must promptly notify the Supreme Court of any court order unsealing the brief. In the absence of such notice the Supreme Court clerk must keep` all copies of the brief under seal.

(3) A copy of each brief must be served on a public officer or agency when required by rule ~~44.5~~ 8.29.

Advisory Committee Comment [revised version]

Subdivision (b). In criminal cases, stipulated extensions of time to file briefs are prohibited by rule. (See rule 8.460(c)(4).)

Subdivision (b)(2) clarifies that a party seeking an extension of time from the presiding justice must proceed by application under rule 8.50 rather than by motion under rule 8.54.

Subdivision (c). In subdivision (c)(2) the word "brief" means only (1) an appellant's opening brief, (2) a respondent's brief, (3) an appellant's reply brief, (4) a petition for rehearing, (5) an answer thereto, or (6) an amicus curiae brief. It follows that no other documents or papers filed in the Court of Appeal, whatever their nature, should be served on the Supreme Court. Further, only briefs filed in the Court of Appeal "in a civil appeal" must be served on the Supreme Court. It follows that no briefs filed in the Court of Appeal in criminal appeals or in original proceedings should be served on the Supreme Court.

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

~~Revised rule 15 is former rule 16, without the provisions of former rule 16(a) governing the time for filing combined briefs in an appeal in which a party is both an appellant and a respondent; those provisions have been moved to a new rule devoted to such appeals (revised rule 16).~~

Subdivision (b). ~~Former rule 16(a) specified the periods within which the parties were required to file their briefs, but then provided that "By stipulation filed with the reviewing court the parties may extend each of such periods for not more than 60 days, and thereafter the time may be extended only by the Chief Justice or Presiding Justice, for good cause shown." The plain implication of the quoted provision, recognized in widespread practice, was that the parties had the right to effectuate such extensions for up to 60 days on their own accord by filing such a stipulation in the reviewing court, and that the stipulation required no action by the reviewing court to be effective. In addition, the former rule did not contemplate the reviewing court's exercising discretion over the length of a stipulated extension for the first 60 days; on the contrary, any inference of such a discretion was negated by the wording of the provision itself, which declared that "*the parties may extend* each of such periods" for up to 60 days and that it was only "thereafter" that a further extension would require action by the reviewing court. Revised rule 15(b)(1)~~

~~continues these provisions in effect but clarifies their wording. It is therefore not a substantive change. Revised subdivision (b)(1) also makes it clear that the parties may file more than one stipulation to extend the briefing periods, provided the total of such extensions does not exceed 60 days.~~

In criminal cases, stipulated extensions of time to file briefs are prohibited by rule. (See rule ~~37(a)~~ 8.460(c)(4).)

~~Revised~~ Subdivision (b)(2) clarifies that a party seeking an extension of time from the presiding justice must proceed by application under rule ~~43~~ 8.50 ~~(see also rules 45(c) and 45.5)~~ rather than by motion under rule ~~41~~ 8.54. ~~The subdivision also provides that to support such a request the applicant must show good cause and either that it has been unable for any reason to obtain an extension by stipulation (revised subd. (b)(2)(A)), or that the parties have stipulated to the 60-day maximum but the applicant seeks a further extension (revised subd. (b)(2)(B)); a party may comply with revised subdivision (b)(2)(A) by showing facts establishing that it would have been futile to seek an initial or a further stipulation from the opposing party. This is a substantive change intended to reduce the burden on reviewing courts by encouraging parties to proceed by stipulation whenever possible.~~

~~Revised subdivision (b)(3) provides that a party need not apply for an extension of time if it can file its brief within the time prescribed by rule 17, and that the clerk must file a brief submitted within that time if it otherwise complies with these rules. This is a substantive change intended to relieve the reviewing courts of the burden of considering unnecessary applications for extension.~~

~~The substantive changes noted in the two preceding paragraphs are adapted from rule 7(a) of the local rules of the Court of Appeal, First Appellate District.~~

Subdivision (c). ~~Revised subdivision (c)(1), like former rule 16(b), provides that one copy of each brief must be served on the superior court clerk, who must in turn deliver it to the trial judge. But the former provision also declared that the clerk "need not maintain a copy in the [superior] court file." Subdivision (c) of revised rule 15 deletes this declaration as an unnecessary directive to the clerk.~~

~~Revised subdivision (c)(2) restates in a more appropriate place a requirement of rule 44(b)(2)(ii). In the revised rule—as in the former rule—~~In subdivision (c)(2) the word "brief" means only (1) an appellant's opening brief, (2) a respondent's brief, (3) an appellant's reply brief, (4) a petition for rehearing, (5) an answer thereto, or (6) an amicus curiae brief. It follows that no other documents or papers filed in the Court of Appeal, whatever their nature, should be served on the Supreme Court. Further, ~~in the revised rule—as in the former rule—~~only briefs filed in the Court of Appeal "in a civil appeal" must be served on the Supreme Court. It follows that no briefs filed in the Court of Appeal in criminal appeals or in original proceedings should be served on the Supreme Court. ~~These are not substantive changes.~~

Rule 8.216. ~~16.~~ Appeals in which a party is both appellant and respondent

(a) Briefing sequence and time to file briefs

In an appeal in which any party is both an appellant and a respondent:

(1) The parties must jointly—or separately if unable to agree—submit a proposed briefing sequence to the reviewing court within 20 days after the second notice of appeal is filed.

(2) After receiving the proposal, the reviewing court must order a briefing sequence and prescribe briefing periods consistent with rule ~~15~~ 8.212(a).

(3) Extensions of time are governed by rule ~~15~~ 8.212(b).

(b) Contents of briefs

(1) A party that is both an appellant and a respondent must combine its respondent's brief with its appellant's opening brief or its reply brief, if any, whichever is appropriate under the briefing sequence that the reviewing court orders.

(2) A party must confine a reply brief to points raised in its own appeal.

(3) A combined brief must address each appeal separately.

Advisory Committee Comment [revised version]

Rule 8.216 applies, first, to all cases in which opposing parties both appeal from the judgment. In addition, it applies to all cases in which one party appeals from the judgment and another party appeals from any appealable order arising from or related to the judgment, i.e., not only orders contemplated by rule 8.108 (denying a motion for judgment notwithstanding the verdict) but also, for example, posttrial orders granting or denying attorney fees. The purpose of the rule is to provide, in all such appeals, a single unified procedure for resolving uncertainties as to the order in which the parties must file their briefs.

As used in this rule, "appellant" includes cross-appellant and "respondent" includes cross-respondent. (Compare rule 8.100(e).)

Subdivision (a). Subdivision (a) implements the above-stated purpose by providing a procedure for determining both the briefing *sequence*—i.e., the order in which the parties must file their briefs—and the briefing *periods*—i.e., the periods of time (e.g., 30 days or 70 days, etc.) within which the briefs must be filed. Subdivision (a)(1) places the burden on the parties in the first instance to propose a briefing sequence, jointly if possible but separately if not. The purpose of this requirement is to assist the reviewing court by giving it the benefit of the parties' views on what is the most efficient briefing sequence in the circumstances of the case. Subdivision (a)(2) then prescribes the role of the reviewing court: after considering the parties' proposal, the court will decide on the briefing sequence, prescribe the briefing periods, and notify the parties of both. The reviewing court, of course, may thereafter modify its order just as it may do in a single-appeal case. Extensions of time are governed by rule 8.212(b).

Subdivision (b). The purpose of subdivision (b)(2) is to ensure that in its reply brief a party addresses only issues germane to its own appeal. For example, a cross-appellant may not use its *cross-appellant's* reply brief to answer points raised in the *appellant's* reply brief.

Advisory Committee Comment ~~(2002)~~ [version showing revisions]

~~Revised rule 16 combines in one rule disparate provisions on the briefs in an appeal in which any party is both an appellant and a respondent. The relevant former rules applied only when a cross-appeal was taken under rule 3 (see former rules 14(d), 16(a)), but revised rule 16 applies more broadly. It includes,~~ Rule 8.216 applies, first, to all cases in which opposing parties both appeal from the judgment. In addition, it ~~includes~~ applies to all cases in which one party appeals from the judgment and another party appeals from any appealable order arising from or related to the judgment, i.e., not only orders contemplated by rule ~~3~~ 8.108 (denying a motion for judgment notwithstanding the verdict) but also, for example, posttrial orders granting or denying attorney fees. ~~To the extent the revised wording is more inclusive, the change is substantive. Its~~The purpose of the rule is to provide, in all such appeals, a single unified procedure for resolving uncertainties as to the order in which the parties must file their briefs.

As used in this rule, "appellant" includes cross-appellant and "respondent" includes cross-respondent. (Compare rule ~~1~~ 8.100(e).)

Subdivision (a). ~~Revised s~~Subdivision (a) implements the above-stated purpose by providing a procedure for determining both the briefing *sequence*—i.e., the order in which the parties must file their briefs—and the briefing *periods*—i.e., the periods of time (e.g., 30 days or 70 days, etc.) within which the briefs must be filed. ~~This is a substantive change.~~ Subdivision (a)(1) places the burden on the parties in the first instance to propose a briefing sequence, jointly if possible but separately if not. The purpose of this requirement is to assist the reviewing court by giving it the benefit of the parties' views on what is the most efficient briefing sequence in the circumstances of the case. Subdivision (a)(2) then prescribes the role of the reviewing court: after considering the parties' proposal, the court will decide on the briefing sequence, prescribe the briefing periods, and notify the parties of both. The reviewing court, of course, may thereafter modify its order just as it may do in a single-appeal case. Extensions of time are governed by ~~revised~~ rule ~~15~~ 8.212(b).

Subdivision (b). ~~Revised subdivision (b)(1) makes mandatory what was permissive under former rule 14(d), by providing that a party appearing as both an appellant and a respondent must combine its respondent's brief with its appellant's opening brief or its reply brief, if any, whichever is appropriate under the briefing sequence that the reviewing court orders. This is a substantive change intended to promote consistency in briefing and to facilitate the reviewing court's use of the briefs.~~

The purpose of ~~revised~~ subdivision (b)(2) is to ensure that in its reply brief a party addresses only issues germane to its own appeal. For example, a cross-appellant may not use its *cross-appellant's* reply brief to answer points raised in the *appellant's* reply brief.

Rule 8.220. ~~17.~~ Failure to file a brief

(a) Notice to file

If a party fails to timely file an appellant's opening brief or a respondent's brief, the reviewing court clerk must promptly notify the party by mail that the brief must be filed within 15 days after the notice is mailed~~,~~ and that failure to comply will result in one of the following sanctions:

(1) If the brief is an appellant's opening brief, the court will dismiss the appeal;

(2) If the brief is a respondent's brief, the court will decide the appeal on the record, the opening brief, and any oral argument by the appellant.

(b) Combined brief

A party that is both an appellant and a respondent under rule ~~16~~ 8.216 may file its combined respondent's brief and appellant's reply brief within the period specified in the notice under (a).

(c) Sanction

If a party fails to comply with a notice under (a), the court may impose the sanction specified in the notice.

(d) Extension of time

Within the period specified in the notice under (a), a party may apply to the presiding justice for an extension of that period for good cause. If the extension is granted and the brief is not filed within the extended period, the court may impose the sanction under (c) without further notice.

Advisory Committee Comment [revised version]

Subdivision (a). Subdivision (a) applies to all appellant's opening briefs and respondent's briefs, but does not apply to reply briefs.

A brief is "timely" under subdivision (a) if it is filed within the normal rule time prescribed for that brief or any extension of that time.

A party that fails to timely file a required brief need not make a formal motion to permit a late filing (e.g., under rule 8.60(d)); it is sufficient to file the brief within the 15-day grace period specified in the notice under subdivision (a).

Subdivision (d). Subdivision (d) clarifies that a party seeking an extension of time from the presiding justice must proceed by application under rule 8.50 rather than by motion under rule 8.54. In conformity with current practice, the subdivision also clarifies that if a brief is not filed within an extension granted by the court, the court may impose sanctions without further notice.

Advisory Committee Comment ~~(2002)~~ [version showing revisions]

~~Subdivisions (a), (c), and (d) of revised rule 17 combine and restate provisions of subdivisions (a) and (b) of the former rule. The change is meant to eliminate redundancy; it is not intended to be substantive, with the exceptions noted below.~~

Subdivision (a). ~~Revised~~ Subdivision (a) applies to all appellant's opening briefs and respondent's briefs, but does not apply to reply briefs.

A brief is "timely" under ~~revised~~ subdivision (a) if it is filed within the normal rule time prescribed for that brief or any extension of that time.

A party ~~who~~ that fails to timely file a required brief need not make a formal motion to permit a late filing (e.g., under rule ~~45(c)~~ 8.60(d)); it is sufficient to file the brief within the 15-day grace period specified in the notice under subdivision (a). ~~(See revised rule 15(b)(3).)~~

~~Under both former rule 17(b) and revised rule 17(a)(2), if a respondent fails to comply with the notice of default the court may decide the appeal on the record, the opening brief, and any oral argument by the appellant. The former rule provided for an additional sanction, i.e., "the court may accept as true the statement of facts in the appellant's opening brief . . . ." The revised rule deletes this provision as surplusage; it is necessarily included in the court's discretionary power to decide the appeal on the appellant's opening brief.~~

~~**Subdivision (b).** Revised subdivision (b) is a clarification that follows from the requirement of revised rule 16(b)(1) that a party that is both an appellant and a respondent must combine its respondent's brief with its appellant's reply brief, if any.~~

Subdivision (d). ~~Revised~~ Subdivision (d) clarifies that a party seeking an extension of time from the presiding justice must proceed by application under rule ~~43~~ 8.50 rather than by motion under rule ~~41~~ 8.54. In conformity with current practice, the ~~revised~~ subdivision also clarifies that if a brief is not filed within an extension granted by the court, the court may impose sanctions without further notice.

~~**Former subdivision (a).** Former rule 17(a), second paragraph, authorized the respondent to move to dismiss the appeal if the clerk's notice of default "is not mailed by the clerk . . . ." The revised rule deletes this provision because it cannot be assumed the clerk will disregard the requirement of subdivision (a) to give such notice to the appellant "promptly" upon expiration of the normal briefing time or its extension.~~

~~The same provision of the former rule also authorized the respondent to move to dismiss if "the appeal is not dismissed on the court's own motion . . . ." The revised rule deletes this provision for two reasons. First, the purpose of rule 17 is to give appellants incentive to complete and file opening briefs within the 15-day grace period; it defeats that purpose to require an appellant to take time during the same period to oppose a respondent's motion to dismiss the appeal on the same ground of tardiness. Second, to require the reviewing court to entertain such a motion is inconsistent with the court's discretion to dismiss under subdivision (c) and hence unnecessarily burdens the court.~~

~~**Former subdivision (c).** Former subdivision (c), which provided that in criminal appeals the period specified in a notice under subdivision (a) is 30 days, has been moved to rule 37.~~

Rule 8.224. ~~18.~~ Transmitting exhibits

(a) Notice of designation

(1) Within 10 days after the last respondent's brief is filed or could be filed under rule ~~17~~ 8.220, a party wanting the reviewing court to consider any original exhibits that were admitted in evidence, refused, or lodged must serve and file a notice in superior court designating such exhibits.

(2) Within 10 days after a notice under (1) is served, any other party wanting the reviewing court to consider additional exhibits must serve and file a notice in superior court designating such exhibits.

(3) A party filing a notice under (1) or (2) must serve a copy on the reviewing court.

(b) Transmittal

Unless the reviewing court orders otherwise, within 20 days after the first notice under (a) is filed:

(1) The superior court clerk must put any designated exhibits in the clerk's possession into numerical or alphabetical order and send them to the reviewing court with two copies of a list of the exhibits sent. If the reviewing court clerk finds the list correct, the clerk must sign and return one copy to the superior court clerk.

(2) Any party in possession of designated exhibits returned by the superior court must put them into numerical or alphabetical order and send them to the reviewing court with two copies of a list of the exhibits sent. If the reviewing court clerk finds the list correct, the clerk must sign and return one copy to the party.

(c) Application for later transmittal

After the periods specified in (a) have expired, a party may apply to the reviewing court for permission to send an exhibit to that court.

(d) Request and return by reviewing court

At any time the reviewing court may direct the superior court or a party to send it an exhibit. On request, the reviewing court may return an exhibit to the superior court or to the party that sent it. When the remittitur issues, the reviewing court must return all exhibits to the superior court or to the party that sent them.

Advisory Committee Comment [revised version]

Subdivision (b). Subdivision (b)(2) provides a procedure by which parties send designated exhibits directly to the reviewing court in cases in which the superior court has returned the exhibits to the parties under Code of Civil Procedure section 1952 or other provision. (See also rule 8.120(a)(5).)

Subdivision (c). Subdivision (c) addresses the case in which a party's need to designate a certain exhibit does not arise until after the period specified in subdivision (a) has expired—for example, when the appellant makes a point in its reply brief that the respondent reasonably believes justifies the reviewing court's consideration of an exhibit it had not previously designated. In that event, the subdivision authorizes the party to apply to the reviewing court for permission to send the exhibit on a showing of good cause.

Advisory Committee Comment ~~(2002)~~ [version showing revisions]

~~Revised rule 18 is former rule 10(d). The provision follows the rules governing briefing in the Court of Appeal (revised rules 13–17) because it deals with a procedure that takes place, if at all, after such briefing is largely complete.~~

~~**Subdivision (a).** Under the former rule, parties wanting original exhibits transmitted to the reviewing court could not request their transmittal until the reviewing court sent formal notice that the appeal had been set for hearing—usually a date no more than 30 days before oral argument. Revised subdivision (a)(1) allows parties to request transmittal of the exhibits as soon as the last respondent's brief is filed or, if no such brief is filed, the last day on which the brief could have been filed under rule 17. This is a substantive change intended to increase the likelihood that when the reviewing court begins its work on the appeal it will have before it the exhibits that the parties believe are necessary to support their positions.~~

~~Revised subdivision (a)(1) requires parties wanting original exhibits transmitted to file their request within 10 days after the last respondent's brief is filed or could be filed under rule 17. The time limit is a substantive change intended to provide a date certain by which all initial requests for exhibits must be received, thus permitting the clerk to process all such requests at the same time, promoting efficiency and minimizing delay.~~

~~Former rule 10(d) provided that a party may specify exhibits "admitted in evidence or rejected" that he desires transmitted to the reviewing court; subdivision (a)(1) of revised rule 18 fills a gap by adding *lodged* exhibits to that list. The change promotes the purpose of the provision.~~

~~Revised subdivision (a)(2) addresses the case in which a party's need to designate a certain exhibit does not arise until after an opposing party has served and filed its notice designating exhibits. In that event, the revised subdivision authorizes the party to designate the exhibit within 10 days after service of the opponent's notice. This is a substantive change.~~

~~Revised subdivision (a)(3) requires any party filing a notice designating exhibits to serve a copy of the notice on the reviewing court. This is a substantive change intended to inform the reviewing court as soon as possible of the exhibits that will be transmitted to the court unless it orders otherwise.~~

Subdivision (b). ~~Revised~~ Subdivision (b)(2) ~~fills a gap by providing~~ provides a procedure by which parties send designated exhibits directly to the reviewing court in cases in which the superior court has returned the exhibits to the parties under Code of Civil Procedure section 1952 or other provision. ~~This is a substantive change.~~ (See also ~~revised~~ rule ~~5~~ 8.120(a)(5).)

Subdivision (c). ~~Revised~~ Subdivision (c) addresses the case in which a party's need to designate a certain exhibit does not arise until after the period specified in subdivision (a) has expired—for example, when the appellant makes a point in its reply brief that the respondent reasonably believes justifies the

reviewing court's consideration of an exhibit it had not previously designated. In that event, the ~~revised~~ subdivision authorizes the party to apply to the reviewing court for permission to send the exhibit on a showing of good cause. ~~This is a substantive change.~~

~~The former rule authorized the reviewing court to require that legible copies be made of illegible exhibits. The revised rule deletes this provision as superfluous: the reviewing court does not require rule authority to so order.~~

~~**Former rule 18**. Former rule 18 has been moved to revised rule 14(e).~~

Article 4. Hearing and Decision in the Court of Appeal

Rule 8.240. ~~19.~~ Calendar preference

A party claiming calendar preference must promptly serve and file a motion for preference in the reviewing court.

Advisory Committee Comment [revised version]

Rule 8.240 requires a party claiming preference to file a motion for preference in the reviewing court. The motion requirement relieves the reviewing court of the burden of searching the record to determine if preference should be ordered. The requirement is not intended to bar the court from ordering preference without a motion when the ground is apparent on the face of the appeal, e.g., in appeals from judgments of dependency (Welf. & Inst. Code, § 395).

The rule is broad in scope: it includes motions for preference on the grounds (1) that a statute provides for preference in the reviewing court (e.g., Code Civ. Proc., §§ 44 [probate proceedings, contested elections, libel by public official]), 45 [judgment freeing minor from parental custody]); (2) that the reviewing court should exercise its discretion to grant preference when a statute provides for trial preference (e.g., id., §§ 35 [certain election matters], 36 [party over 70 and in poor health; party with terminal illness; minor in wrongful death action]; see Warren v. Schecter (1997) 57 Cal.App.4th 1189, 1198–1199); and (3) that the reviewing court should exercise its discretion to grant preference on a nonstatutory ground (e.g., economic hardship).

Because valid grounds for preference could arise after the filing of the reply brief, e.g., a diagnosis of terminal illness, the rule requires the motion to be filed "promptly," i.e., as soon as the ground for preference arises.

Advisory Committee Comment ~~(2003)~~ [version showing revisions]

~~Revised rule 19 is former rule 19.3. Like the former rule, the revised~~ Rule 8.240 requires a party claiming preference to file a motion for preference in the reviewing court. ~~The revised rule fills a gap by requiring the motion to be served on the opposing party.~~

The motion requirement relieves the reviewing court of the burden of searching the record to determine if preference should be ordered. The requirement is not intended to bar the court from ordering preference without a motion when the ground is apparent on the face of the appeal, e.g., in appeals from judgments of dependency (Welf. & Inst. Code, § 395).

~~Like the former rule,~~ The ~~revised~~ rule is broad in scope: it includes motions for preference on the grounds (1) that a statute provides for preference in the reviewing court (e.g., Code Civ. Proc., §§ 44 [probate proceedings, contested elections, libel by public official]), 45 [judgment freeing minor from parental custody]); (2) that the reviewing court should exercise its discretion to grant preference when a statute provides for trial preference (e.g., *id.*, §§ 35 [certain election matters], 36 [party over 70 and in poor health; party with terminal illness; minor in wrongful death action]; see *Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1198–1199); and (3) that the reviewing court should exercise its discretion to grant preference on a nonstatutory ground (e.g., economic hardship).

~~The former rule required the motion to be filed "no later than the last day for filing the appellant's reply brief." In a substantive change, the revised rule deletes this provision because it is unduly restrictive:~~ Because valid grounds for preference could arise after the filing of the reply brief, e.g., a diagnosis of terminal illness~~. Instead~~, the ~~revised~~ rule requires the motion to be filed "promptly," i.e., as soon as the ground for preference arises.

~~The former rule provided that "[f]ailure to comply with this rule may be deemed a waiver" of the preference claim. To the extent the quoted provision referred to a failure to comply with the former specific time limit for filing the motion, it is no longer relevant; and to the extent the provision referred more broadly to the reviewing court's authority to deny the motion on any appropriate ground, it is unnecessary. The provision is therefore deleted from the revised rule.~~

Rule 8.244. ~~20.~~ Settlement, abandonment, voluntary dismissal, and compromise

(a) Notice of settlement

(1) If a civil case settles after a notice of appeal has been filed either as a whole or as to any party, the appellant who has settled must immediately serve and file a notice of settlement in the Court of Appeal. If the parties have designated a clerk's or a reporter's transcript and the record has not been filed in the Court of Appeal, the appellant must also immediately serve a copy of the notice on the superior court clerk.

(2) If the case settles after the appellant receives a notice setting oral argument or a prehearing conference, the appellant must also immediately notify the Court of Appeal of the settlement by telephone or other expeditious method.

(3) Within 45 days after filing a notice of settlement—unless the court has ordered a longer time period on a showing of good cause—the appellant who filed the notice of settlement must file either an abandonment under (b), if the record has not yet been filed in the Court of Appeal or a request to dismiss under (c), if the record has already been filed in the Court of Appeal.

(4) If the appellant does not file an abandonment, a request to dismiss, or a letter stating good cause why the appeal should not be dismissed within the time

period specified under (3), the court may dismiss the appeal as to that appellant and order each side to bear its own costs on appeal.

(5) This subdivision does not apply to settlements requiring findings to be made by the Court of Appeal under Code of Civil Procedure section 128(a)(8).

(b) Abandonment

(1) Before the record is filed in the Court of Appeal, the appellant may serve and file in superior court an abandonment of the appeal or a stipulation to abandon the appeal. The filing effects a dismissal of the appeal and restores the superior court's jurisdiction.

(2) The superior court clerk must promptly notify the Court of Appeal and the parties of the abandonment or stipulation.

(c) Request to dismiss

(1) After the record is filed in the Court of Appeal, the appellant may serve and file in that court a request or a stipulation to dismiss the appeal.

(2) On receipt of a request or stipulation to dismiss, the court may dismiss the appeal and direct immediate issuance of the remittitur.

(d) Approval of compromise

If a guardian or conservator seeks approval of a proposed compromise of a pending appeal, the Court of Appeal may, before ruling on the compromise, direct the trial court to determine whether the compromise is in the minor's or the conservatee's best interests and to report its findings.

~~**Advisory Committee Comment (2003)**~~

~~Revised rule 20 is composed of former rules 19 and 19.5(e).~~

~~**Subdivision (a).** Revised rule 20(a)(1) fills a gap by requiring the appellant to *serve* any notice of settlement that it files. The change is intended to ensure that all parties agree that a settlement has in fact been reached.~~

~~The former rule provided that if the record had not been "completed and transmitted to the reviewing court" when the case settles, the appellant was required to (1) give a separate notice of settlement—i.e., in addition to the notice to the reviewing court—to the superior court clerk and (2) "include proof thereof with the notice to the reviewing court." The second sentence of revised rule 20(a)(1) makes two substantive changes. First, the revised rule makes the date on which the requirement ends more precise by fixing it as the date on which the record is *filed* in the reviewing court. Second, the revised rule simplifies~~

~~the process by requiring the appellant only to *serve a copy* of the notice to the reviewing court on the superior court clerk; that service accomplishes the same notification purpose as the former dual notice procedure. The same sentence fills a gap by recognizing that when the parties have not designated a clerk's or reporter's transcript (e.g., when they are proceeding by appendix under rule 5.1), there is no record for the superior court to prepare and hence no purpose in notifying that court of the settlement.~~

~~Former rule 19.5(e) required the appellant to give the reviewing court "telephone or other oral notice" if a prehearing conference or an oral argument was "imminent" at the time of settlement. The former rule thus neither provided for expeditious methods of giving notice other than orally nor did it define the relative term "imminent." Revised rule 20(a)(2) fills these gaps: the appellant may notify the reviewing court by telephone or "other expeditious method" of communication and must do so if the case settles "after the appellant receives a notice setting oral argument or a prehearing conference." The changes are substantive. In addition, by requiring that the appellant "also" give such expedited notice when appropriate, the revised rule intends the expedited notice to be not a substitute for but an addition to the normal written notice of settlement that the appellant must serve and file under revised subdivision (a)(1).~~

~~**Subdivision (b).** Revised rule 20(b) is former rule 19(a). Consistent with current practice, the revised rule distinguishes between an *abandonment* of the appeal effectuated by the parties before the record is filed in the reviewing court (revised subd. (b)) and a *dismissal* of the appeal ordered by the reviewing court after the record is filed (revised subd. (c)).~~

~~Former rule 19(c) placed on the superior court clerk the duty of notifying the respondent that the appellant had filed an abandonment. In a substantive change, revised rule 20(b) simplifies the process by relieving the clerk of that duty and instead requiring the appellant to *serve* any abandonment that it files.~~

~~**Subdivision (c).** Revised rule 20(c) is former rule 19(b). Revised subdivision (c)(1) provides that after the record is filed in the reviewing court an appellant wanting to terminate the appeal must either serve and file in that court a *request to dismiss* the appeal or file in that court a *stipulation* to dismiss signed by all parties to the appeal. The requirement that the appellant *serve* a request to dismiss is a substantive change intended to ensure that the respondent is promptly made aware that the appellant has asked the reviewing court to dismiss the appeal.~~

~~Revised subdivision (c)(2) confirms that the decision whether to dismiss the appeal after the record is filed is discretionary with the reviewing court.~~

~~**Former subdivision (c).** Former rule 19(c) required the appropriate clerk to notify the respondent of the filing of either a notice of abandonment or an order of dismissal. The first is now addressed in revised subdivision (b)(2), which requires the superior court clerk to notify all parties of an abandonment, and the second duplicates the requirement of revised rule 24(a)(1) that the Court of Appeal clerk send copies of all orders to the parties. The revised rule therefore deletes the provision as unnecessary.~~

~~**Subdivision (d).** Revised rule 20(d) is former rule 19(d) rewritten in contemporary language but without substantive change.~~

Rule 8.248. ~~21.~~ Prehearing conference

(a) Statement and conference

After the notice of appeal is filed in a civil case, the presiding justice may:

(1) Order one or more parties to serve and file a concise statement describing the nature of the case and the issues presented; and

(2) Order all necessary persons to attend a conference to consider a narrowing of the issues, settlement, and other relevant matters.

(b) Agreement

An agreement reached in a conference must be signed by the parties and filed. Unless the Court of Appeal orders otherwise, the agreement governs the appeal.

(c) Proceedings after conference

(1) Unless allowed by a filed agreement, no matter recited in a statement under (a)(1) or discussed in a conference under (a)(2) may be considered in any subsequent proceeding in the appeal other than in another conference.

(2) Neither the presiding officer nor any court personnel present at a conference may participate in or influence the determination of the appeal.

(d) Time to file brief

The time to file a party's brief under rule ~~15~~ 8.212(a) is tolled from the date the Court of Appeal mails notice of the conference until the date it mails notice that the conference is concluded.

Advisory Committee Comment [revised version]

Subdivision (a). Subdivision(a)(1) requires each party to *serve* any statement it files. (Cf. rule 3.1380(d) [pretrial settlement conference statement must be served on each party].) The service requirement is not intended to prohibit the presiding justice from ordering the parties to submit additional, confidential material in appropriate cases.

Subdivision (d). If a prehearing conference is ordered before the due date of the appellant's opening brief, the time to file the brief is not *extended* but *tolled*, in order to avoid unwarranted lengthening of the briefing process. For example, if the conference is ordered 15 days after the start of the normal 30-day briefing period, the rule simply *suspends* the running of that period; when the period resumes, the party will not receive an automatic extension of a full 30 days but rather the remaining 15 days of the original briefing period, unless the period is otherwise extended.

Under subdivision (d) the tolling period continues "until the date [the Court of Appeal] mails notice that the conference is *concluded*" (italics added). This provision is intended to accommodate the possibility that the conference may not conclude on the date it begins.

Whether or not the conference concludes on the date it begins, subdivision (d) requires the Court of Appeal clerk to mail the parties a notice that the conference is concluded. This provision is intended to facilitate the calculation of the new briefing due dates.

Advisory Committee Comment ~~(2003)~~ [version showing revisions]

~~Revised rule 21 is composed of subdivisions (a) through (d) of former rule 19.5.~~

Subdivision (a). ~~Former rule 19.5(a) authorized the presiding justice only to order the *appellant* to file a statement describing the case and the issues for the prehearing conference. Because the respondent's input may be no less useful than the appellant's, revised rule 21(a)(1) authorizes the presiding justice more broadly to order "one or more parties" to file the statement in question. This is a substantive change.~~

~~Revised rule 21~~ Subdivision(a)(1) ~~fills a gap by requiring~~ requires each party to *serve* any statement it files. (Cf. rule ~~222~~ 3.1380(d) [pretrial settlement conference statement must be served on each party].) ~~The change is intended to promote the purpose of the conference by informing each party as soon as possible of parties' views of the case.~~ The service requirement is not intended to prohibit the presiding justice from ordering the parties to submit additional, confidential material in appropriate cases.

~~Former rule 19.5(a)(2) specified that a justice of the reviewing court would preside at the conference. Revised rule 21(a) deletes that specification in order to conform to current practice, which allows nonjudicial personnel such as attorney volunteers also to preside.~~

~~Subdivision (b).~~ ~~Former rule 19.5(a) required agreements reached in a conference to be reduced to writing but did not permit them to be filed or to govern the appeal unless they were also "executed as a stipulation and approved by the conference judge." In a substantive change, revised rule 21(b) simplifies the process in two ways. First, it requires that the agreement be signed by the parties; this means the agreement must also be put in writing, and makes it the functional equivalent of an executed stipulation. Second, the revised rule deletes the requirement of approval by the conference judge (or other presiding officer) as not germane to the purpose of the rule, which is to encourage *the parties* to agree on settling the case or at least on simplifying the issues.~~

Subdivision (d). ~~Former rule 19.5(d) provided that if a conference was to be held before the due date of the appellant's opening brief, the time to file that brief was extended for 30 days after the conference date. Revised rule 21(d) makes several substantive changes in this provision.~~

~~First, the provision is not limited to the time to file an *appellant's* opening brief but applies to the time to file *any* party's brief under rule 15(a).~~

~~Second,~~ If a prehearing conference is ordered before the due date of the appellant's opening brief, the time to file the brief is not *extended* but *tolled*, in order to avoid unwarranted lengthening of the briefing process. For example, if the conference is ordered 15 days after the start of the normal 30-day briefing period, the ~~revised~~ rule simply *suspends* the running of that period; when the period resumes, the party will not receive an automatic extension of a full 30 days but rather the remaining 15 days of the original briefing period, unless the period is otherwise extended.

~~Third, under former rule 19.5(d) the extension period began on the conference date. Under revised rule 21(d) the tolling period begins instead on the date the Court of Appeal *mails notice* to the parties that it~~

~~has ordered the conference. This change is intended to promote the purpose of the subdivision, which is to suspend briefing as soon as the conference is ordered because of the possibility that it will result in settlement or simplification of issues.~~

~~Fourth,~~ Under ~~the revised~~ subdivision (d) the tolling period continues "until the date [the Court of Appeal] mails notice that the conference is *concluded*" (italics added). This ~~change~~ provision is intended to accommodate the possibility that the conference may not conclude on the date it begins.

~~Fifth,~~ Whether or not the conference concludes on the date it begins, ~~the revised~~ subdivision (d) requires the Court of Appeal clerk to mail the parties a notice that the conference is concluded. This ~~change~~ provision is intended to facilitate the calculation of the new briefing due dates.

Rule 8.252. ~~22.~~ Judicial notice; findings and evidence on appeal

(a) Judicial notice

(1) To obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a separate motion with a proposed order.

(2) If the matter to be noticed is not in the record, the party must serve and file a copy with the motion or explain why it is not practicable to do so.

(b) Findings on appeal

A party may move that the reviewing court make findings under Code of Civil Procedure section 909. The motion must include proposed findings.

(c) Evidence on appeal

(1) A party may move that the reviewing court take evidence.

(2) An order granting the motion must:

(A) State the issues on which evidence will be taken;

(B) Specify whether the court, a justice, or a special master or referee will take the evidence; and

(C) Give notice of the time and place for taking the evidence.

(3) For documentary evidence, a party may offer the original, a certified copy, or a photocopy. The court may admit the document in evidence without a hearing.

~~**Advisory Committee Comment (2003)**~~

~~**Subdivision (a).** Revised rule 22(a) is former rule 41.5.~~

~~**Subdivision (b).** Revised rule 22(b) is former rule 23(a). The former rule permitted counsel to present a request for appellate findings either by application or in a brief. Although such findings are rare, when they are made they can be dispositive of the appeal. For this reason, revised rule 22(b) requires any request for such findings to be presented by the more formal process of serving and filing a motion, with the consequent right of the adverse party to serve and file an opposition. (See rule 41.) The change is substantive.~~

~~The reference in revised rule 22(b) to Code of Civil Procedure section 909 is not a substantive change, because that statute also governed former rule 23(a) even though the former rule did not expressly refer to it.~~

~~**Subdivision (c).** Revised rule 22(c) is former rule 23(b). The former rule provided that if a party filed an application "in accordance with rule 41" – i.e., a motion – to present evidence in the appeal, the Court of Appeal had discretion to "grant or deny the [motion] in whole or in part, and subject to such conditions as it may deem proper." Because the court has that discretion in any event, revised rule 22(c) deletes the provision as unnecessary.~~

~~Revised rule 22(c)(3) resolves an ambiguity in the former rule by expressly providing that the court may admit a document into evidence "without a hearing."~~

Rule <u>8.256.</u> ~~23.~~ Oral argument and submission of the cause

(a) Frequency and location of argument

(1) Each Court of Appeal and division must hold a session at least once each quarter.

(2) A Court of Appeal may hold sessions at places in its district other than the court's permanent location.

(3) Subject to approval by the Chair of the Judicial Council, a Court of Appeal may hold a session in another district to hear a cause transferred to it from that district.

(b) Notice of argument

The Court of Appeal clerk must send a notice of the time and place of oral argument to all parties at least 20 days before the argument date. The presiding justice may shorten the notice period for good cause; in that event, the clerk must immediately notify the parties by telephone or other expeditious method.

(c) Conduct of argument

Unless the court provides otherwise by local rule or order:

(1) The appellant, petitioner, or moving party has the right to open and close. If there are two or more such parties, the court must set the sequence of argument.

(2) Each side is allowed 30 minutes for argument. If multiple parties are represented by separate counsel, or if an amicus curiae—on written request—is granted permission to argue, the court may apportion or expand the time.

(3) Only one counsel may argue for each separately represented party.

(d) When the cause is submitted

(1) A cause is submitted when the court has heard oral argument or approved its waiver and the time has expired to file all briefs and papers, including any supplemental brief permitted by the court.

(2) If the Supreme Court transfers a cause to the Court of Appeal and supplemental briefs may be filed under rule ~~13~~ 8.200(b), the cause is submitted when the last such brief is or could be timely filed. The Court of Appeal may order the cause submitted at an earlier time if the parties so stipulate.

(e) Vacating submission

(1) Except as provided in (2), the court may vacate submission only by an order stating its reasons and setting a timetable for resubmission.

(2) If a cause is submitted under (d)(2), an order setting oral argument vacates submission~~,~~ and the cause is resubmitted when the court has heard oral argument or approved its waiver.

~~**Advisory Committee Comment (2003)**~~

~~Revised rule 23 combines provisions relating to oral argument and submission of the cause in the Courts of Appeal that appeared in former rules 21, 21.5, 22.1, and 22.5.~~

~~**Subdivision (a).** Former rule 21.5 directed each Court of Appeal to "adopt a written policy and procedure" for holding special sessions in places other than the court's permanent location. The former rule also imposed certain minimum conditions on the holding of special sessions. In a substantive change,~~

~~revised rule 23(a)(2) simplifies the process by giving each Court of Appeal discretion to determine whether, when, and where to hold such special sessions and the conditions under which they will be held.~~

~~Former rule 21(a) provided that a motion filed in the Court of Appeal would be decided without oral argument but could be placed on calendar by the presiding justice. The revised rule deletes this provision because the topic is covered in the general rule on motions in the reviewing court. (See rule 41.)~~

~~**Subdivision (b).** Former rule 21(c) required the reviewing court clerk to give the parties written notice of the time and place of oral argument "[w]hen an appeal is set for hearing." Revised rule 23(b) requires instead that the clerk must send the notice at least 20 days before the argument date. This is a substantive change intended (1) to enhance the benefit of oral argument to the reviewing court by ensuring that the parties have adequate time to prepare, (2) to reduce the number of counsel's calendar conflicts with other courts, and (3) to promote consistency between Courts of Appeal and districts on this important step in the appellate process. Because even 20 days' notice may be impractical or impossible in certain circumstances, the revised rule also authorizes the presiding justice to shorten the period for good cause, with immediate notice to the parties.~~

~~Former rule 21(c) imposed on the reviewing court clerk the duty to include in the notice of hearing a reminder that the parties must file a notice designating exhibits to be transmitted to the reviewing court (see former rule 10(d)). The revised rule relieves the clerk of this duty because the reminder is no longer necessary: under revised rule 18(a), the time for the parties to file a notice in the superior court designating exhibits to be transmitted expires 10 days after the last respondent's or cross-respondent's brief is filed or due, and that event ordinarily occurs before the reviewing court clerk sends the notice setting oral argument.~~

~~**Subdivision (c).** Revised rule 23(c) is former rule 22.1, rearranged and clarified; no substantive change is intended.~~

~~**Subdivisions (d) and (e).** Revised rule 23(d) and (e) are former rule 22.5.~~

~~Revised subdivision (d)(2) is former rule 22.5(c). The former provision declared that if a cause that a Court of Appeal had previously decided by opinion was transferred to it by the Supreme Court, the cause was deemed submitted on one of three dates set forth in three successive provisions. Each of these provisions, however, presented problems of interpretation or application.~~

~~The first submission date under the former rule was 60 days after the last supplemental brief was timely filed. (Former rule 22.5(c)(i).) But the parties have up to 30 days in which to file such briefs (revised rule 13(a)(4)), and the Court of Appeal then has 90 days after submission in which to file its opinion (Cal. Const., art. VI, § 19), making a total of 180 allowable days between the order of transfer and the resulting opinion. A delay of that length can cause hardship to the parties. By definition, all appeals governed by revised subdivision (d)(2) have spent time not only in the Court of Appeal but also in the Supreme Court, and therefore have been pending longer than other cases in the Court of Appeal. They should therefore be given expedited treatment if possible. Moreover, the delay is particularly unjustifiable in view of the nature of the cases involved: the majority are either "grant and hold" cases (see revised rule 28.2(c)) that the Supreme Court transfers to the Court of Appeal for it to apply the Supreme Court's decision in a lead case on the same issue (see revised rule 29.3(d)) or cases in which the Supreme Court decides the issue on which review was granted and directs the Court of Appeal to resolve one or more undecided, usually secondary, issues (see revised rule 29.3(c)). In either event the case is unlikely to be complicated; if it is~~

~~complicated, the Court of Appeal may vacate submission by order (revised subd. (e)(1)) or by setting the case for oral argument (revised subd. (e)(2)).~~

~~The second submission date under the former rule was "60 days after receipt [by the Court of Appeal] of the record and of the Supreme Court's transfer order," in cases in which no timely supplemental briefs were filed. (Former rule 22.5(c)(ii).) The quoted language was ambiguous because there is ordinarily no single date when the Court of Appeal receives both the transfer order and the record. Rather, in the vast majority of cases it is the practice of the Supreme Court to send the transfer order immediately after it is filed but to send the record a few days later.~~

~~The former rule could have been read to mean that the submission date was 60 days after the later of receipt of the record or receipt of the transfer order; or the reference to the transfer order could have been read out of the rule as superfluous, because such orders are always received before the record. But neither solution would have eliminated an unintended consequence of the former rule – i.e., that it had the effect of backdating the submission and arbitrarily shortening the time available to the Court of Appeal to decide the matter. It had this effect because the provision applied only if no timely supplemental briefs were filed, and the Court of Appeal would probably not know whether such briefs would be filed until the end of the first 15-day period following the Supreme Court transfer order. If no brief was filed, the submission date was 60 days after receipt of the record and transfer order. But in most cases those triggering events had taken place within a few days – 5, for example – after the start of the first 15-day briefing period. Accordingly, in such cases the submission date was not in fact a total of 75 days after the transfer order but – in the same example – 10 days less.~~

~~The third submission date under the former rule was the same as the date provided by subdivision (a) of the former rule and applied in cases in which "oral argument is scheduled within either of the preceding times." (Former rule 22.5(c)(iii).) The quoted language was ambiguous insofar as it could mean either that oral argument was set or that it was held within one of the 60-day periods.~~

~~In a substantive change intended to avoid the foregoing problems and simplify the process generally, revised rule 23(d)(2) deletes the cited provisions and provides instead that if the Supreme Court transfers to the Court of Appeal a cause in which "supplemental briefs may be filed under rule 13(b)" – i.e., a cause that the Court of Appeal has previously decided by opinion – the cause is submitted when the last supplemental brief is, or could be, timely filed under rule 13(b).~~

~~Former rule 22.5(c) also granted the Court of Appeal discretion to submit the cause sooner than the rule provided, but subjected the exercise of that discretion to a condition, i.e., early submission was required to be "consistent with rule 29.4 and with any instructions of the Supreme Court." The revised rule deletes the condition as unnecessary because the Court of Appeal is required in any event to comply with other rules of court and with any Supreme Court instructions. Instead, the revised rule recognizes that the parties may want to expedite the final resolution of an appeal that has already spent time in both the Court of Appeal and the Supreme Court; for that reason, revised subdivision (d)(2) grants the Court of Appeal discretion to submit such a cause at an earlier time if the parties so stipulate. The change is substantive.~~

~~Revised subdivision (e)(1) is former rule 22.5(b). The requirement that an order vacating submission set a timetable for resubmission is implied in the former rule and is consistent with Supreme Court practice.~~

~~Revised subdivision (e)(2) is a substantive change intended to supplement the operation of revised subdivision (d)(2).~~

Rule 8.260. Opinions [reserved]

Rule 8.264. ~~24.~~ Filing, finality, and modification of decision

(a) Filing the decision

(1) The Court of Appeal clerk must promptly file all opinions and orders of the court and promptly send copies showing the filing date to the parties and, when relevant, to the lower court or tribunal.

(2) A decision by opinion must identify the participating justices, including the author of the majority opinion and of any concurring or dissenting opinion, or the justices participating in a "by the court" opinion.

(b) Finality of decision

(1) Except as otherwise provided in this rule, a Court of Appeal decision, including an order dismissing an appeal involuntarily, is final in that court 30 days after filing.

(2) The following Court of Appeal decisions are final in that court on filing:

(A) The denial of a petition for a writ within the court's original jurisdiction without issuance of an alternative writ or order to show cause;

(B) The denial of a petition for writ of supersedeas;

(C) The denial of an application for bail or to reduce bail pending appeal;

(D) The denial of a transfer of a case within the appellate jurisdiction of the superior court; and

(E) The dismissal of an appeal on request or stipulation.

(3) If necessary to prevent mootness or frustration of the relief granted or to otherwise promote the interests of justice, a Court of Appeal may order early finality in that court of a decision granting a petition for a writ within its original jurisdiction or denying such a petition after issuing an alternative writ or order to show cause. The decision may provide for finality in that court on filing or within a stated period of less than 30 days.

(4) A Court of Appeal decision denying a petition for writ of habeas corpus without issuing an order to show cause is final in that court on the same day

that its decision in a related appeal is final if the two decisions are filed on the same day. If the Court of Appeal orders rehearing of the decision in the appeal, its decision denying the petition for writ of habeas corpus is final when its decision on rehearing is final.

(5) If a Court of Appeal certifies its opinion for publication or partial publication after filing its decision and before its decision becomes final in that court, the finality period runs from the filing date of the order for publication.

(c) Modification of decision

(1) A reviewing court may modify a decision until the decision is final in that court. If the clerk's office is closed on the date of finality, the court may modify the decision on the next day the clerk's office is open.

(2) An order modifying an opinion must state whether it changes the appellate judgment. A modification that does not change the appellate judgment does not extend the finality date of the decision. If a modification changes the appellate judgment, the finality period runs from the filing date of the modification order.

(d) Consent to increase or decrease in amount of judgment

If a Court of Appeal decision conditions the affirmance of a money judgment on a party's consent to an increase or decrease in the amount, the judgment is reversed unless, before the decision is final under (b), the party serves and files two copies of a consent in the Court of Appeal. If a consent is filed, the finality period runs from the filing date of the consent. The clerk must send one file-stamped copy of the consent to the superior court with the remittitur.

Advisory Committee Comment [revised version]

Subdivision (b). As used in subdivision (b)(1), "decision" includes all interlocutory orders of the Court of Appeal. (See Advisory Committee Comment to rule 8.300(a) and (e).)

Subdivision (b)(5) provides that a postfiling decision of the Court of Appeal to publish its opinion in whole under rule 8.975(c) or in part under rule 8.980(a) restarts the 30-day finality period. This provision is based on rule 40-2 of the United States Circuit Rules (9th Cir.). It is intended to allow parties sufficient time to petition the Court of Appeal for rehearing and/or the Supreme Court for review—and to allow potential amici curiae sufficient time to express their views—when the Court of Appeal changes the publication status of an opinion. The rule thus recognizes that the publication status of an opinion may affect a party's decision whether to file a petition for rehearing and/or a petition for review.

Advisory Committee Comment ~~(2003)~~ [version showing revisions]

~~**Subdivision (a).** Revised rule 24(a)(2) is former rule 23.5.~~

Subdivision (b). As used in ~~revised rule 24~~ subdivision (b)(1), "decision" includes all interlocutory orders of the Court of Appeal. (See Advisory Committee Comment to ~~revised rule 28(d)~~rule 8.300(a) and (e).)

~~The first sentence of revised subdivision (b)(4) restates a provision of former rule 24(a); the second sentence is new and implements the purpose of the first.~~

~~Revised~~ Subdivision (b)(5) ~~is new: it~~ provides that a postfiling decision of the Court of Appeal to publish its opinion in whole under rule ~~976~~ 8.975(c) or in part under rule ~~976.1~~ 8.980(a) restarts the 30-day finality period. This ~~substantive change~~ provision is based on rule 40-2 of the United States Circuit Rules (9th Cir.). It is intended to allow parties sufficient time to petition the Court of Appeal for rehearing and/or the Supreme Court for review—and to allow potential amici curiae sufficient time to express their views—when the Court of Appeal changes the publication status of an opinion. The rule thus recognizes that the publication status of an opinion may affect a party's decision whether to file a petition for rehearing and/or a petition for review.

~~**Subdivision (d).** Former rule 24(c) was silent on the question whether the finality period is affected when a party files a consent to an increase or decrease in the amount of the judgment that results in affirmance. Revised subdivision (d) fills that gap by providing that the filing of the consent restarts the finality period. This substantive change is intended to allow the opposing parties sufficient time to petition for rehearing and/or review when it becomes clear that the judgment will be affirmed. The provision is consistent with revised subdivisions (b)(5) (finality runs from filing date of belated publication order) and (c)(2) (finality runs from filing date of modification order changing the appellate judgment).~~

Rule 8.268. ~~25.~~ Rehearing

(a) Power to order rehearing

(1) On petition of a party or on its own motion, a reviewing court may order rehearing of any decision that is not final in that court on filing.

(2) An order for rehearing must be filed before the decision is final. If the clerk's office is closed on the date of finality, the court may file the order on the next day the clerk's office is open.

(b) Petition and answer

(1) A party may serve and file a petition for rehearing within 15 days after:

(A) The filing of the decision;

(B) A publication order restarting the finality period under rule ~~24~~ 8.264(b)(5), if the party has not already filed a petition for rehearing;

(C) A modification order changing the appellate judgment under rule ~~24~~ 8.264(c)(2); or

(D) The filing of a consent under rule ~~24~~ 8.264(d).

(2) A party must not file an answer to a petition for rehearing unless the court requests an answer. The clerk must promptly send to the parties copies of any order requesting an answer and immediately notify the parties by telephone or another expeditious method. Any answer must be served and filed within 8 days after the order is filed unless the court orders otherwise. A petition for rehearing normally will not be granted unless the court has requested an answer.

(3) The petition and answer must comply with the relevant provisions of rule ~~14~~ 8.204.

(4) Before the decision is final and for good cause, the presiding justice may relieve a party from a failure to file a timely petition or answer.

(c) No extension of time

The time for granting or denying a petition for rehearing in the Court of Appeal may not be extended. If the court does not rule on the petition before the decision is final, the petition is deemed denied.

(d) Effect of granting rehearing

An order granting a rehearing vacates the decision and any opinion filed in the case and sets the cause at large in the Court of Appeal.

~~**Advisory Committee Comment (2004)**~~

~~Revised rule 25 is derived from former rule 27.~~

~~**Subdivision (a).** Former rule 27(a) purported to list the types of cases in which the Court of Appeal could not order rehearing, but the list was incomplete. It listed only a Court of Appeal's denial of a writ petition without issuing an alternative writ or order to show cause and a Court of Appeal's denial of a transfer of a case from a municipal court. What these two have in common is that they exemplify decisions that are final in the Court of Appeal on filing, and if a decision is final on filing there is no opportunity to file a petition for rehearing. But there are three more types of cases that are final in the Court of Appeal on filing—denial of supersedeas, denial of bail, and dismissal on request (see revised rule 24(b)(2)(B), (C), (E))—and in each the court likewise declines to entertain a petition for rehearing.~~

~~To fill these gaps, revised rule 25(a)(1) provides simply that a Court of Appeal may order rehearing of any decision that is not final in that court on filing, i.e., under revised rule 24. The change is not a substantive.~~

~~The second sentence of revised subdivision (a)(2) is derived from former rule 24(a).~~

~~**Subdivision (b).** The provisions of revised rule 25(b)(1) and (3) are derived from subdivisions (b) and (d), respectively, of former rule 27.~~

~~Former rule 27(b) provided only that a petition for rehearing could be filed within 15 days after the filing of the decision. In a substantive change, revised rule 25(b)(1) provides that a petition for rehearing may also be filed within 15 days after a postfiling order of the Court of Appeal publishing its opinion, a modification order changing the appellate judgment, or the filing of a consent to an increase or decrease in the amount of a money judgment; all are events that restart the 30-day finality period under revised rule 24. However, a party that has already filed a petition for rehearing may not file a second petition for rehearing after a publication order. (Revised subd. (b)(1)(B).)~~

~~Subdivision (b)(2), as revised in 2004, changes procedures related to answers to petitions for rehearing. Instead of authorizing the filing of answers in all cases, this revised rule permits answers to be filed only when the court requests them.~~

~~Revised subdivision (b)(4) restates a provision of rule 45(c).~~

~~**Subdivision (c).** The first sentence of revised rule 25(c) restates a provision appearing in rule 45(c). The second sentence restates a provision of former rule 27(e); in doing so, the revised subdivision deletes as superfluous the directive to the clerk to "enter a notation in the register" that a petition for rehearing is deemed denied because it was not ruled on before finality. It is assumed that in the rare case in which the situation may arise the clerk will routinely enter such a notation. The change is not substantive.~~

~~**Subdivision (d).** For purposes of completeness, revised rule 25(d) states the case law on the effect of ordering rehearing. It is not a substantive change.~~

Rule 8.272. ~~26.~~ Remittitur

(a) Proceedings requiring issuance of remittitur

A Court of Appeal must issue a remittitur after a decision in:

(1) An appeal; or

(2) An original proceeding, except when the court denies a writ petition without issuing an alternative writ or order to show cause.

(b) Clerk's duties

(1) If a Court of Appeal decision is not reviewed by the Supreme Court:

(A) The Court of Appeal clerk must issue a remittitur immediately after the Supreme Court denies review, or the period for granting review expires, or the court dismisses review under rule ~~29.3~~ 8.328(b); and

(B) The clerk must send the lower court or tribunal the Court of Appeal remittitur and a file-stamped copy of the opinion or order.

(2) After Supreme Court review of a Court of Appeal decision:

(A) On receiving the Supreme Court remittitur, the Court of Appeal clerk must issue a remittitur immediately if there will be no further proceedings in the Court of Appeal; and

(B) The clerk must send the lower court or tribunal the Court of Appeal remittitur, a copy of the Supreme Court remittitur, and a file-stamped copy of the Supreme Court opinion or order.

(c) Immediate issuance, stay, and recall

(1) A Court of Appeal may direct immediate issuance of a remittitur only on the parties' stipulation or on dismissal of the appeal under rule ~~20~~ 8.244(c)(2).

(2) On a party's or its own motion or on stipulation, and for good cause, the court may stay a remittitur's issuance for a reasonable period or order its recall.

(3) An order recalling a remittitur issued after a decision by opinion does not supersede the opinion or affect its publication status.

(d) Notice

(1) The remittitur is deemed issued when the clerk enters it in the record. The clerk must immediately send the parties notice of issuance of the remittitur, showing the date of entry.

(2) If, without requiring further proceedings in the trial court, the decision changes the length of a state prison sentence, applicable credits, or the maximum permissible confinement to the Youth Authority, the clerk must send a copy of the remittitur and opinion or order to the Department of Corrections or the Youth Authority.

~~**Advisory Committee Comment (2003)**~~

~~Revised rule 26 is derived from former rule 25.~~

Subdivision (a). In specifying the cases that require issuance of a remittitur, former rule 25(a) provided as follows with regard to original proceedings in the reviewing court: "(3) any original proceeding in which an alternative writ or order to show cause has been issued addressed to a lower court, board or tribunal; or (4) any original proceeding determining on the merits the validity of the decision of a lower court, board or tribunal without issuance of an order to show cause or alternative writ. A remittitur shall not be issued when an original petition is summarily denied." This provision meant, in effect, that there had to be a remittitur in an original proceeding in which the court issued an alternative writ or order to show cause and in an original proceeding in which the court summarily granted writ relief, but not in an original proceeding in which the court summarily denied writ relief. Revised rule 26(a)(2) restates that provision in simpler terms; it is not intended to be a substantive change.

Subdivision (b). Revised rule 26(b)(1)(A) fills a gap by directing the Court of Appeal clerk to issue a remittitur when the Supreme Court denies review. The provision states current Court of Appeal practice; it is not a substantive change.

Former rule 25(a) provided that after Supreme Court review of a Court of Appeal decision, the Court of Appeal was required to issue its remittitur either (1) immediately, if the result was an unqualified affirmance or reversal, or (2) after the finality of "such further proceedings as are mandated by the Supreme Court." The latter wording caused uncertainty when the Supreme Court did not expressly mandate further proceedings but additional issues remained for the Court of Appeal to resolve on remand. Revised rule 26(b)(2)(A) clarifies that if the Court of Appeal conducts postreview proceedings—whether or not expressly mandated by the Supreme Court—the Court of Appeal will issue a new remittitur either (1) under revised subdivision (b)(2)(A) if the decision is subsequently reviewed by the Supreme Court or (2) under revised subdivision (b)(1)(A) if it is not.

Former rule 25(a) directed the Court of Appeal clerk to send the remittitur and "a certified copy" of the court's opinion to the lower court. It was the practice of most of the Courts of Appeal to comply with this directive by issuing a remittitur in which the clerk declared that he or she "certified" that the opinion attached to the remittitur was a copy of the original opinion; the remittitur was signed by the clerk and stamped with the court's seal, but the attached opinion was not stamped with that seal. Although the revised rule does not use the word "certified" because of its possible ambiguity, the rule is not intended to change this practice.

Revised rule 26(b)(1) requires the Court of Appeal clerk to file-stamp the copy of the opinion attached to the remittitur. Although the former rule did not expressly require this step, it is not a substantive change: file-stamping such opinions is the general practice in the Courts of Appeal.

Subdivision (c). Former rule 25(c) was silent on the question whether a party wanting the court to stay the issuance of its remittitur was required to serve and file a motion for that relief. Revised rule 26(c)(2), which combines the provisions for both staying and recalling a remittitur, makes it clear that such a motion is necessary. No substantive change is intended.

Former rule 25(d) did not expressly require good cause for a reviewing court to recall a remittitur on a party's or its own motion. In accord with the case law, revised rule 26(c)(2) states this requirement expressly; it is not a substantive change. Also in accord with the case law, "good cause" as used in revised subdivision (c)(2) has substantially different meanings depending on whether it is applied to a stay or to a recall of a remittitur. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 735–741, pp. 764–771.)

~~For purposes of completeness, revised subdivision (c)(3) states the case law on the effect of the recall of a remittitur. It is not a substantive change.~~

~~**Subdivision (d).** Revised rule 26(d)(1) requires the reviewing court clerk, in sending the parties notice of issuance of the remittitur, to show the date the remittitur was entered. Although the former rule did not expressly require that showing, it is current practice to do so; the change is therefore not substantive.~~

Rule 8.276. ~~27.~~ Costs and sanctions

(a) Right to costs

(1) Except as provided in this rule, the party prevailing in the Court of Appeal in a civil case is entitled to costs on appeal.

(2) The prevailing party is the respondent if the Court of Appeal affirms the judgment without modification or dismisses the appeal. The prevailing party is the appellant if the court reverses the judgment in its entirety.

(3) If the court reverses the judgment in part or modifies it, or if there is more than one notice of appeal, the opinion must specify the award or denial of costs.

(4) If the interests of justice require it, the court may award or deny costs as it deems proper.

(5) In probate cases, the prevailing party must be awarded costs unless the Court of Appeal orders otherwise, but the superior court must decide who will pay the award.

(b) Judgment for costs

(1) The Court of Appeal clerk must enter on the record, and insert in the remittitur, a judgment awarding costs to the prevailing party under (a)(2) or as directed by the court under (a)(3) or (a)(4).

(2) If the clerk fails to enter judgment for costs, the court may recall the remittitur for correction on its own motion, or on a party's motion made not later than 30 days after the remittitur issues.

(c) Recoverable costs

(1) A party may recover only the following costs, if reasonable:

(A) The amount the party paid for any portion of the record, whether an original or a copy or both. The cost to copy parts of a prior record under rule ~~10~~ 8.147(b)(2) is not recoverable unless the Court of Appeal ordered the copying;

(B) The cost to produce additional evidence on appeal;

(C) The costs to notarize, serve, mail, and file the record, briefs, and other papers;

(D) The cost to print and reproduce any brief, including any petition for rehearing or review, answer, or reply; and

(E) The cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral, unless the trial court determines the bond was unnecessary.

(2) Unless the court orders otherwise, an award of costs neither includes attorney fees on appeal nor precludes a party from seeking them under rule ~~870.2~~ 3.1702.

(d) Procedure for claiming or opposing costs

(1) Within 40 days after the clerk sends notice of issuance of the remittitur, a party claiming costs awarded by a reviewing court must serve and file in the superior court a verified memorandum of costs under rule ~~870~~ 3.1700.

(2) A party may serve and file a motion in the superior court to strike or tax costs claimed under (1) in the manner required by rule ~~870~~ 3.1700.

(3) An award of costs is enforceable as a money judgment.

(e) Sanctions

(1) On a party's or its own motion, a Court of Appeal may impose sanctions, including the award or denial of costs, on a party or an attorney for:

(A) Taking a frivolous appeal or appealing solely to cause delay;

(B) Including in the record any matter not reasonably material to the appeal's determination; or

(C) Committing any other unreasonable violation of these rules.

(2) A party's motion under (1) must include a declaration supporting the amount of any monetary sanction sought and must be served and filed before any order dismissing the appeal but no later than 10 days after the appellant's reply brief is due. If a party moves to dismiss the appeal, with or without a sanctions motion, and the motion to dismiss is not granted, the party may move for sanctions within 10 days after the appellant's reply brief is due.

(3) The court must give notice in writing if it is considering imposing sanctions. Within 10 days after the court sends such notice, a party or attorney may serve and file an opposition, but failure to do so will not be deemed consent. An opposition may not be filed unless the court sends such notice.

(4) Unless otherwise ordered, oral argument on the issue of sanctions must be combined with oral argument on the merits of the appeal.

Advisory Committee Comment [revised version]

Rule 8.276 applies only to costs in appeals in ordinary civil cases; it is not intended to expand the categories of appeals subject to the award of costs.

Subdivision (c). Subdivision (c)(1)(A) is intended to refer not only to a normal record prepared by the clerk and the reporter under rules 8.120 and 8.130, but also, for example, to an appendix prepared by a party under rule 8.124 and to a superior court file to which the parties stipulate under rule 8.128.

Subdivision (d). Subdivision (d)(2) provides the procedure for a party to move in the trial court to strike or tax costs that another party has claimed under subdivision (d)(1). It is not intended that the trial court's authority to strike or tax unreasonable costs be limited by any failure of the moving party to move for sanctions in the Court of Appeal under subdivision (e); a party may seek to strike or tax costs on the ground that an opponent included unnecessary materials in the record even if the party did not move the Court of Appeal to sanction the opponent under subdivision (e)(1)(B).

Advisory Committee Comment ~~(2003)~~ [version showing revisions]

~~Revised rule 27 is derived from former rule 26. Like the former rule, the revised r~~Rule 8.276 applies only to costs in appeals in ordinary civil cases; it is not intended to expand the categories of appeals subject to the award of costs.

~~**Subdivision (a).** Former rule 26(a)(3) required the Court of Appeal to specify the award or denial of costs in its opinion if there was more than one notice of appeal or if the judgment was modified or reversed in part *or in its entirety*; revised rule 27(a)(3) no longer requires the court's opinion to specify costs if the judgment is reversed in its entirety. This is a substantive change intended to relieve the court of the burden of specifying costs in those cases—full affirmance or full reversal—in which it is usually clear who is the prevailing party. That party is entitled to costs under the general rule of revised subdivision (a)(1) and (2), and should not have to bear the risk of a failure to specify such costs. In a case in which a different award may be proper, the Court of Appeal has the discretion to so specify under revised subdivision (a)(4).~~

Subdivision (c). ~~Former rule 26(c) permitted recovery of certain listed costs if they were "reasonable," but did not expressly require other listed costs to be "reasonable" in order to be recoverable. The failure to require this appears to be an oversight, which revised rule 27(c)(1) rectifies by requiring *all* recoverable costs to be reasonable. No substantive change is intended.~~

~~Former rule 26(c)(1) limited the recoverable cost of record preparation to the cost of "an original and one copy . . . if the party is the appellant, or one copy of the record if the party is the respondent." The provision failed to authorize a respondent to recover the costs it incurred for portions of the original record, e.g., the respondent's appendix under revised rule 5.1 or transcripts of additional oral proceedings designated under revised rule 4(a)(2). In a substantive change intended to fill this gap, revised rule 27(c)(1)(A) provides more generally that any party entitled to costs may recover the amount it actually paid for any portion of the record, whether an original or a copy or both. Like the former rule, the revised s~~Subdivision (c)(1)(A) is intended to refer not only to a normal record prepared by ~~the reporter and~~ the clerk and the reporter under rules ~~4 and 5~~ 8.120 and 8.130, but also, for example, to an appendix prepared by a party under rule ~~5.1~~ 8.124 and to a superior court file to which the parties stipulate under rule ~~5.2~~ 8.128.

~~Former rule 5(b) required a respondent to pay the cost of copying into the record any exhibits it designated for that purpose, and former rule 26(c)(1) barred recovery of that cost. Because revised rule 5 no longer imposes that cost on a respondent, revised rule 27(c)(1)(A) deletes the latter provision of former rule 26 as obsolete.~~

~~Former rule 26(c)(1) barred recovery of the cost of any method of record preparation in excess of the cost of preparation "in typewriting" unless the parties stipulated otherwise. Revised rule 27(c)(1)(A) deletes this limitation as obsolete in light of current methods of record preparation.~~

Subdivision (d). ~~Revised rule 27(d)(2), like former rule 26(d),~~ Subdivision (d)(2) provides the procedure for a party to move in the trial court to strike or tax costs that another party has claimed under ~~revised~~ subdivision (d)(1). It is not intended that the trial court's authority to strike or tax unreasonable costs be limited by any failure of the moving party to move for sanctions in the Court of Appeal under ~~revised~~ subdivision (e)~~:~~; a party may seek to strike or tax costs on the ground that an opponent included unnecessary materials in the record even if the party did not move the Court of Appeal to sanction the opponent under ~~revised~~ subdivision (e)(1)(B). ~~No substantive change is intended.~~

~~Subdivision (e).~~ ~~Former rule 26(e) omitted to authorize the Court of Appeal to impose sanctions on its own motion. Consistent with current practice, revised rule 27(e)(1) expressly recognizes the court's authority to do so. No substantive change is intended.~~

~~Former rule 26(e) required that a party's motion for monetary sanctions be served and filed concurrently with any motion by the same party to dismiss the appeal, but in no event later than 10 days after the appellant's reply brief is due. The former rule, however, failed to prescribe the time limit for a respondent to serve and file a sanctions motion when the appellant requested that the appeal be voluntarily dismissed under what is now revised rule 20(c). Revised rule 27(e)(2) fills this gap by providing more generally that any party's sanctions motion must be served and filed before any order dismissing the appeal but no later than 10 days after the appellant's reply brief is due.~~

Article 5. Hearing and Decision in the Supreme Court

Rule 8.300. ~~28.~~ Petition for review

(a) Right to file a petition, answer, or reply

(1) A party may file a petition in the Supreme Court for review of any decision of the Court of Appeal, including any interlocutory order, except the denial of a transfer of a case within the appellate jurisdiction of the superior court.

(2) A party may file an answer responding to the issues raised in the petition. In the answer, the party may ask the court to address additional issues if it grants review.

(3) The petitioner may file a reply to the answer.

(b) Grounds for review

The Supreme Court may order review of a Court of Appeal decision:

(1) When necessary to secure uniformity of decision or to settle an important question of law;

(2) When the Court of Appeal lacked jurisdiction;

(3) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or

(4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

(c) Limits of review

(1) As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal.

(2) A party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing.

(d) Petitions in nonconsolidated proceedings

If the Court of Appeal decides an appeal and denies a related petition for writ of habeas corpus without issuing an order to show cause and without formally consolidating the two proceedings, a party seeking review of both decisions must file a separate petition for review in each proceeding.

(e) Time to serve and file

(1) A petition for review must be served and filed within 10 days after the Court of Appeal decision is final in that court under rule ~~24~~ 8.264. For purposes of this rule, the date of finality is not extended if it falls on a day on which the clerk's office is closed.

(2) The time to file a petition for review may not be extended, but the Chief Justice may relieve a party from a failure to file a timely petition for review if the time for the court to order review on its own motion has not expired.

(3) If a petition for review is presented for filing before the Court of Appeal decision is final in that court, the Supreme Court clerk must accept it and file it on the day after finality.

(4) Any answer to the petition must be served and filed within 20 days after the petition is filed.

(5) Any reply to the answer must be served and filed within 10 days after the answer is filed.

(f) Additional requirements

(1) The proof of service must name each party represented by each attorney served.

(2) The petition must also be served on the superior court clerk and the Court of Appeal clerk.

(3) A copy of each brief must be served on a public officer or agency when required by statute or by rule ~~44.5~~ 8.29.

(4) The Supreme Court clerk must file the petition even if its proof of service is defective, but if the petitioner fails to file a corrected proof of service within five days after the clerk gives notice of the defect the court may strike the petition or impose a lesser sanction.

(g) Amicus curiae letters

(1) Any person or entity wanting to support or oppose a petition for review or for an original writ must serve on all parties and send to the Supreme Court an amicus curiae letter rather than a brief.

(2) The letter must describe the interest of the amicus curiae. Any matter attached to the letter or incorporated by reference must comply with rule ~~28.1~~ 8.304(e).

(3) Receipt of the letter does not constitute leave to file an amicus curiae brief on the merits under rule ~~29.1~~ 8.320(f).

Advisory Committee Comment [revised version]

Subdivision (a). Subdivision (a)(1) makes it clear that any interlocutory order of the Court of Appeal—such as an order denying an application to appoint counsel, to augment the record, or to allow oral argument—is a "decision" that may be challenged by petition for review.

Subdivision (e). Subdivision (e)(1) provides that a petition for review must be served and filed within 10 days after the Court of Appeal decision is *final in that court*. Finality in the Court of Appeal is governed by rule 8.264. Rule 8.264(b) declares the general rule that a Court of Appeal decision is final in that court 30 days after filing. The provision then carves out five specific exceptions—decisions that it declares to be final immediately on filing (see rule 8.264(b)(2)). The plain implication is that all other Court of Appeal orders—specifically, interlocutory orders that may be the subject of a petition for review—are *not* final on filing. This implication is confirmed by current practice, in which parties may be allowed to apply for—and the Courts of Appeal may grant—reconsideration of such interlocutory orders; reconsideration, of course, would be impermissible if the orders were in fact final on filing.

Contrary to paragraph (2) of subdivision (e), paragraphs (4) and (5) do not prohibit extending the time to file an answer or reply; because the subdivision thus expressly forbids an extension of time only with respect to the petition for review, by clear negative implication it permits an application to extend the time to file an answer or reply under rule 8.50.

Subdivision (f). Subdivision (f)(2) requires that the petition (but not an answer or reply) be served on the Court of Appeal clerk. To assist litigants, subdivision (f)(2) also states explicitly what is impliedly required by rule 8.212(c), i.e., that the petition must also be served on the superior court clerk (for delivery to the trial judge).

Advisory Committee Comment ~~(2003)~~ [version showing revisions]

~~Revised rule 28 and new rules 28.1 and 28.2 group in logical sequence all the provisions on the subject of ordering review in the Supreme Court (former rules 28 and 29), but make few substantive changes.~~

~~Revised rule 28 collects in one rule the basic procedural requirements for filing a petition for review, answer, or reply, i.e., who may file and what may be reviewed, the grounds and limits of review, when to serve and file, additional service, and amicus curiae letters. The requirements of form and content are collected in new rule 28.1.~~

Subdivision (a). ~~Former rule 28(a) began by providing for an event that occurs only infrequently—an order of review on the Supreme Court's own motion. To focus the rules on the far more common practice of granting review on petition of a party, revised rule 28 is limited to that subject; review on the court's own motion is addressed in revised rule 28.2(d).~~

~~Although subdivision (a) of the former rule authorized the Supreme Court to review only "decisions" of the Court of Appeal, the Advisory Committee Comment to the 1985 revision of the rule explained that under the rule "[t]he Supreme Court may review Court of Appeal interlocutory orders and orders summarily denying writs within their original jurisdiction, as well as decision[s] on the merits resolving the ultimate outcome of the cause." Under revised rule 24(b)(2)(A), a summary denial of a writ petition is a "decision" of the Court of Appeal; but no rule tells litigants that for purposes of this rule an~~Subdivision (a)(1) makes it clear that any interlocutory order of the Court of Appeal—such as an order denying an application to appoint counsel, to augment the record, or to allow oral argument—is ~~also~~ a "decision" that may be challenged by petition for review. ~~To make this point clear, revised subdivision (a)(1) expressly states that a party may file a petition to review interlocutory orders of the Court of Appeal. It is not a substantive change.~~

~~**Subdivision (b).** Revised subdivision (b)(1)–(3) restates without substantive change the provisions of former rule 29(a). Revised subdivision (b)(4) fills a gap by recognizing the Supreme Court's longstanding practice of ordering review, in appropriate cases, not to decide the case itself but for the purpose of transferring the case to the Court of Appeal with instructions to conduct certain further proceedings (e.g., with instructions to issue an alternative writ or order to show cause returnable before the Court of Appeal or the superior court).~~

~~**Subdivision (c).** Revised subdivision (c) restates without substantive change the provisions of former rule 29(b).~~

~~**Subdivision (d).** Revised subdivision (d) fills a gap by recognizing the Supreme Court's practice of requiring separate petitions for review when a party seeks review of both a decision in an appeal and a decision denying a related petition for habeas corpus without an order to show cause *if the Court of Appeal did not formally consolidate the two proceedings*. If the Court of Appeal did formally consolidate the proceedings, a single petition for review must be filed.~~

Subdivision (e). ~~Revised~~ Subdivision (e)(1) provides that a petition for review must be served and filed within 10 days after the Court of Appeal decision is *final in that court*. Finality in the Court of Appeal is governed by ~~revised~~ rule ~~24~~ 8.264. ~~Revised r~~Rule ~~24~~ 8.264(b)~~, like former rule 24(a),~~ declares the general rule that a Court of Appeal decision is final in that court 30 days after filing. The provision then carves out five specific exceptions—decisions that it declares to be final immediately on filing (see ~~revised~~ rule ~~24~~ 8.264(b)(2)). The plain implication is that all other Court of Appeal orders—specifically, interlocutory orders that may be the subject of a petition for review—are *not* final on filing. This implication is confirmed by current practice, in which parties may be allowed to apply for—and the Courts of Appeal may grant—reconsideration of such interlocutory orders; reconsideration, of course, would be impermissible if the orders were in fact final on filing. ~~Nevertheless, the 1985 Appellate Advisory Committee Comment to rule 28 suggested that for purposes of determining when the 10-day period for petitioning for review begins, interlocutory Court of Appeal orders "may also be deemed final forthwith." Revised rule 28 does not adopt that suggestion, because to do so would create a trap for the unwary: by the time a party had applied for reconsideration of an interlocutory order and the Court of Appeal had denied relief, the 10-day period for petitioning for review could well have expired. Accordingly, under~~

~~revised rule 28(e)(1) the time of finality of all Court of Appeal decisions, including interlocutory orders, is to be determined by reference to revised rule 24, the general rule on the subject.~~

~~Paragraph (2) of revised subdivision (e) provides that the time to file a petition for review may not be extended, but the Chief Justice may relieve a party from a failure to file a timely petition under certain circumstances. These provisions are derived from rule 45(c) and have been moved to revised rule 28 to inform litigants as soon as possible of the consequences of failing to file a timely petition for review. Under settled Supreme Court practice, an order either granting or denying relief from failure to file a timely petition for review may be signed by the Chief Justice alone.~~

Contrary to paragraph (2) of ~~revised~~ subdivision (e), paragraphs (4) and (5) do not prohibit extending the time to file an answer or reply; ~~rule 45(c)~~ because the subdivision thus expressly forbids an extension of time only with respect to the petition for review, ~~and hence~~ by clear negative implication it permits an application to extend the time to file an answer or reply under rule ~~43~~ 8.50.

Subdivision (f). ~~Revised~~ Subdivision (f)(2)~~, like former subdivision (b),~~ requires that the petition (but not an answer or reply) be served on the Court of Appeal clerk. To assist litigants, ~~the revised~~ subdivision (f)(2) also states explicitly what is impliedly required by rule ~~15~~ 8.212(c), i.e., that the petition must also be served on the superior court clerk (for delivery to the trial judge).

~~**Subdivision (g).** Former subdivision (f) purported to require the Supreme Court clerk to *lodge* amicus curiae letters and to authorize the court in its discretion to *file* such letters. Revised subdivision (g) deletes these terms to reflect current Supreme Court practice, in which amicus curiae letters are neither lodged nor filed but simply marked "received."~~

~~**Former subdivision (f)** provided that the Supreme Court "may, in its discretion, elect to consider the letter . . . ." Because the court has that discretion in any event, the revised subdivision deletes the provision as unnecessary.~~

~~**Former subdivision (e).** The last two sentences of former subdivision (e)(2) provided in effect that the Supreme Court need consider only the issues raised in a petition or answer or fairly included in them. The point is now addressed in revised rule 29, which deals with issues on review.~~

~~**Former subdivision (g).** Former subdivision (g) purported to list the causes in which the Supreme Court would or would not hear oral argument after granting review. A portion of the list, however, was inconsistent with Supreme Court practice, and the remainder was superfluous. It is therefore deleted from the revised rule; no substantive change is intended.~~

~~**Footnote 1 to former rule 28.** As noted in footnote 1 to former rule 28, for purposes of this rule a "decision" of the Court of Appeal does not include an order denying a petition for rehearing, unless in the same order the Court of Appeal modifies its filed decision so as to change its appellate judgment. (See revised rule 24(c)(2).)~~

Rule 8.304. ~~28.1.~~ Form and contents of petition, answer, and reply

(a) In general

Except as provided in this rule, a petition for review, answer, and reply must comply with the relevant provisions of rule ~~14~~ 8.204.

(b) Contents of a petition

(1) The body of the petition must begin with a concise, nonargumentative statement of the issues presented for review, framing them in terms of the facts of the case but without unnecessary detail.

(2) The petition must explain how the case presents a ground for review under rule ~~28~~ 8.300(b).

(3) If a petition for rehearing could have been filed in the Court of Appeal, the petition for review must state whether it was filed and, if so, how the court ruled.

(4) If the petition seeks review of a Court of Appeal opinion, a copy of the opinion showing its filing date and a copy of any order modifying the opinion or directing its publication must be bound at the back of the original petition and each copy filed in the Supreme Court.

(5) The title of the case and designation of the parties on the cover of the petition must be identical to the title and designation in the Court of Appeal opinion or order that is the subject of the petition.

(6) Rule ~~33.3~~ 8.308 governs the form and content of a petition for review filed by the defendant in a criminal case for the sole purpose of exhausting state remedies before seeking federal habeas corpus review.

(c) Contents of an answer

An answer that raises additional issues for review must contain a concise, nonargumentative statement of those issues, framing them in terms of the facts of the case but without unnecessary detail.

(d) Length

(1) If produced on a computer, a petition or answer must not exceed 8,400 words and a reply must not exceed 4,200 words. Such a petition, answer, or reply must include a certificate by appellate counsel or an unrepresented party stating the number of words in the document. The person certifying may rely on the word count of the computer program used to prepare the document.

(2) If typewritten, a petition or answer must not exceed 30 pages and a reply must not exceed 15 pages.

(3) The tables, the Court of Appeal opinion, a certificate under (1), and any attachment under (f)(1) are excluded from the limits stated in (1) and (2).

(4) On application and for good cause, the Chief Justice may permit a longer petition, answer, reply, or attachment.

(e) Attachments and incorporation by reference

(1) No attachments are permitted except an opinion or order from which the party seeks relief and exhibits or orders of a trial court or Court of Appeal that the party considers unusually significant and do not exceed a total of 10 pages.

(2) No incorporation by reference is permitted except a reference to a petition, an answer, or a reply filed by another party in the same case or filed in a case that raises the same or similar issues and in which a petition for review is pending or has been granted.

Advisory Committee Comment [revised version]

Subdivision (d). Subdivision (d) states in terms of word counts rather than page counts the maximum permissible lengths of a petition for review, answer, or reply produced on a computer. This provision tracks a provision in rule 8.204(c) governing Court of Appeal briefs and is explained in the advisory committee comment to that provision.

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

~~New rule 28.1 collects in one rule the provisions of former rule 28 governing the form and content of a petition for review, answer, and reply.~~

~~**Subdivision (b).** Subdivision (b)(3) makes uniform a common practice that provides the court with information needed to administer the provisions of revised rule 28(c).~~

~~Subdivision (b)(4) restates the requirement of former rule 28(e)(4) that a copy of the Court of Appeal opinion be bound with the petition for review, and adds that a copy of any Court of Appeal order modifying that opinion or directing its publication must also be bound with the petition. This substantive change is intended to assist the Supreme Court in two respects. First, if the Court of Appeal issues an order modifying its opinion so as to change the appellate judgment or directing its publication, the finality period runs anew from the date of the order. (Rule 24(b)(5), (c)(2).) Second, whether or not a modification order changes the appellate judgment, binding that order with the petition furnishes the Supreme Court with the final text of the opinion for its review.~~

~~Subdivision (b)(5) fills a gap by recognizing the Supreme Court's practice of requiring that the title of the case and designation of the parties on the cover of the petition be identical to the title and designation in the Court of Appeal opinion. The requirement assists the court in tracking the case.~~

Subdivision (d). Subdivision (d) states in terms of word counts rather than page counts the maximum permissible lengths of a petition for review, answer, or reply produced on a computer. This ~~substantive change~~provision tracks a provision in ~~revised~~ rule ~~14~~ 8.204(c) governing Court of Appeal briefs and is explained in the advisory committee comment to that provision.

~~**Subdivision (e).** Paragraphs (1) and (2) of subdivision (e) restate and simplify portions of, respectively, the second paragraph of former rule 28(e)(6) and the third paragraph of former rule 28(e)(5). No substantive change is intended.~~

~~The first and third paragraphs of former rule 28(e)(5) in effect required parties to include their points, authorities, and arguments in the bodies of their petitions, answers, and replies. New rule 28.1(e) deletes these provisions as superfluous: the same requirements are imposed by rule 14(a)(1), which is made applicable to petitions, answers, and replies by new rule 28.1(a).~~

~~The third paragraph of former rule 28(e)(5) authorized a party to incorporate by reference portions of a petition, answer, and reply filed by another party in the same case or filed by any party in "a connected case" in which a petition for review was pending or had been filed. New rule 28.1(e)(2) deletes as ambiguous the term "a connected case" and substitutes the more descriptive phrase, "a case that raises the same or similar issues," i.e., irrespective of the identity of the parties. The change is not substantive.~~

Rule 8.308. ~~33.3.~~ Petition for review to exhaust state remedies

(a) Purpose

After decision by the Court of Appeal in a criminal case, a defendant may file an abbreviated petition for review in the Supreme Court for the sole purpose of exhausting state remedies before presenting a claim for federal habeas corpus relief.

(b) Form and contents

(1) The words "Petition for Review to Exhaust State Remedies" must appear prominently on the cover of the petition.

(2) Except as provided in (3), the petition must comply with rule ~~28.1~~ 8.304.

(3) The petition need not comply with rule ~~28.1~~ 8.304(b)(1)–(2) but must include:

(A) A statement that the case presents no grounds for review under rule ~~28~~ 8.300(b) and the petition is filed solely to exhaust state remedies for federal habeas corpus purposes;

(B) A brief statement of the underlying proceedings, including the nature of the conviction and the punishment imposed; and

(C) A brief statement of the factual and legal bases of the claim.

(c) Service

The petition must be served on the Court of Appeal clerk but need not be served on the superior court clerk.

Advisory Committee Comment [revised version]

Subdivision (b). Although a petition under this rule must state (subd. (b)(3)(A)) that "the case presents no grounds for review under rule 8.300(b)," this does not mean the Supreme Court cannot order review if it determines the case warrants review. The list of grounds for granting review in rule 8.300(b) is not intended to be exclusive, and from time to time the Supreme Court has exercised its discretion to order review in a case that does not present one of the listed grounds. (Compare U.S. Supreme Court Rule 10 [the listed grounds for granting certiorari, "although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers"].)

Subdivision (b)(3)(C) requires the petition to include a statement of the factual and legal bases of the claim. This showing is required by federal law: "for purposes of exhausting state remedies, a claim for relief [in state court] . . . must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." (*Gray v. Netherland* (1996) 518 U.S. 152, 162–163, citing *Picard v. Connor* (1971) 404 U.S. 270.) The federal courts will decide whether a petition filed in compliance with this rule satisfies federal exhaustion requirements, and practitioners should consult federal law to determine whether the petition's statement of the factual and legal bases for the claim is sufficient for that purpose.

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

Subdivision (b). Although a petition under this rule must state (subd. (b)(3)(A)) that "the case presents no grounds for review under rule ~~28~~ 8.300(b)," (~~rule 33.3~~ ~~8.308(b)(3)(A)),~~ this does not mean the Supreme Court cannot order review if it determines the case warrants ~~it~~ review. The list of grounds for granting review in rule ~~28~~ 8.300(b) is not intended to be exclusive, and from time to time the Supreme Court has exercised its discretion to order review in a case that does not present one of the listed grounds. (Compare U.S. Supreme Court Rule 10 [the listed grounds for granting certiorari, "although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers"].)

~~Rule 33.3~~Subdivision (b)(3)(C) requires the petition to include a statement of the factual and legal bases of the claim. This showing is required by federal law: "for purposes of exhausting state remedies, a claim for relief [in state court] . . . must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." (*Gray v. Netherland* (1996) 518 U.S. 152, 162–163, citing *Picard v. Connor* (1971) 404 U.S. 270.) The federal courts will decide whether a petition filed in compliance with this rule satisfies federal exhaustion requirements, and practitioners should consult federal law to determine whether the petition's statement of the factual and legal bases for the claim is sufficient for that purpose.

Rule 8.312. ~~28.2.~~ Ordering review

(a) Transmittal of record

On receiving a copy of a petition for review or on request of the Supreme Court, whichever is earlier, the Court of Appeal clerk must promptly send the record to the Supreme Court. If the petition is denied, the Supreme Court clerk must promptly return the record to the Court of Appeal.

(b) Determination of petition

(1) The court may order review within 60 days after the last petition for review is filed. Before the 60-day period or any extension expires, the court may order one or more extensions to a date not later than 90 days after the last petition is filed.

(2) If the court does not rule on the petition within the time allowed by (1), the petition is deemed denied.

(c) Review on the court's own motion

(1) If no petition for review is filed, the Supreme Court may, on its own motion, order review of a Court of Appeal decision within 30 days after the decision is final in that court. Before the 30-day period or any extension expires, the Supreme Court may order one or more extensions to a date not later than 90 days after the decision is final in the Court of Appeal. If any such period ends on a day on which the clerk's office is closed, the court may order review on its own motion on the next day the clerk's office is open.

(2) If a petition for review is filed, the Supreme Court may deny the petition but order review on its own motion within the periods prescribed in (b)(1).

(d) Order; grant and hold

(1) An order granting review must be signed by at least four justices; an order denying review may be signed by the Chief Justice alone.

(2) On or after granting review, the court may order action in the matter deferred until the court disposes of another matter or pending further order of the court.

Advisory Committee Comment [revised version]

Subdivision (b). The Supreme Court deems the 60-day period within which it may grant review to begin on the filing date of the last petition for review that either (1) is timely in the sense that it is filed within the rule time for such petitions (i.e., 10 days after finality of the Court of Appeal decision) or (2) is treated as timely—although presented for filing after expiration of the rule time—in the sense that it is filed with permission of the Chief Justice on a showing of good cause for relief from default. In each circumstance it is the filing of the petition that triggers the 60-day period.

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

~~New rule 28.2 collects in one rule provisions of former rules 28 and 29.2 governing the transmittal of the record on petition for review, the time within which the Supreme Court may grant or deny review, "grant and hold" orders, and ordering review on the court's own motion.~~

~~**Subdivision (a).** Subdivision (a) of new rule 28.2 simplifies a provision of former rule 28(b) by directing the Court of Appeal clerk to send "the record" to the Supreme Court; further specification is unnecessary. The subdivision also deletes as unnecessary micromanagement the former directive to the Supreme Court clerk to retain and renumber that record if review is granted.~~

Subdivision (b). ~~Former rule 28(a)(2) authorized the Supreme Court to grant review within 60 days after the filing of the last "timely" petition for review, but the word "timely" was both ambiguous and superfluous.~~ The Supreme Court deems the 60-day period within which it may grant review to begin on the filing date of the last petition for review that either (1) is timely in the sense that it is filed within the rule time for such petitions (i.e., 10 days after finality of the Court of Appeal decision) or (2) is treated as timely—although presented for filing after expiration of the rule time—in the sense that it is filed with permission of the Chief Justice on a showing of good cause for relief from default (~~former rule 45(c), now revised rule 28(e)(2)~~). In each circumstance it is the filing of the petition that triggers the 60-day period. ~~New rule 28.2(b) therefore deletes the word "timely"; no substantive change is intended.~~

~~**Subdivision (c).** Subdivision (c) of new rule 28.2 is former rule 28(a)(1), authorizing orders of review on the Supreme Court's own motion. The former provision, however, apparently assumed the court would exercise this authority only in cases in which "no petition for review is filed." The assumption was not prima facie unreasonable, but in practice the court may occasionally wish to order review on its own motion even when a party has petitioned for review – for example, in a case in which the party seeks review only on an issue that the court deems unworthy of review and fails to seek review on an issue that the court does wish to consider. To fill this gap, subdivision (c)(2) expressly authorizes the court in such a case to "deny the petition but order review on its own motion within the periods prescribed in subdivision (b)(1), i.e., during the time that it has jurisdiction to grant the petition for review.~~

~~**Subdivision (d).** Subdivision (d)(2) of new rule 28.2 is former rule 29.2(c). Its wording has been conformed to current Supreme Court practice; no substantive change is intended.~~

Rule 8.316. ~~29.~~ Issues on review

(a) Issues to be briefed and argued

(1) On or after ordering review, the Supreme Court may specify the issues to be briefed and argued. Unless the court orders otherwise, the parties must limit

their briefs and arguments to those issues and any issues fairly included in them.

(2) Notwithstanding an order specifying issues under (1), the court may, on reasonable notice, order oral argument on fewer or additional issues or on the entire cause.

(b) Issues to be decided

(1) The Supreme Court may decide any issues that are raised or fairly included in the petition or answer.

(2) The court may decide an issue that is neither raised nor fairly included in the petition or answer if the case presents the issue and the court has given the parties reasonable notice and opportunity to brief and argue it.

(3) The court need not decide every issue the parties raise or the court specifies.

~~**Advisory Committee Comment (2003)**~~

~~**Subdivision (a).** Revised rule 29(a) is former rule 29.2(b).~~

~~**Subdivision (b).** Revised rule 29(b)(1) is former rule 29.2(a). Revised subdivision (b)(2) and (3) reflects current Supreme Court practice; no substantive change is intended.~~

Rule 8.320. ~~29.1.~~ Briefs by parties and amici curiae; judicial notice

(a) Parties' briefs; time to file

(1) Within 30 days after the Supreme Court files the order of review, the petitioner must serve and file in that court either an opening brief on the merits or the brief it filed in the Court of Appeal.

(2) Within 30 days after the petitioner files its brief or the time to do so expires, the opposing party must serve and file either an answer brief on the merits or the brief it filed in the Court of Appeal.

(3) The petitioner may file a reply brief on the merits or the reply brief it filed in the Court of Appeal. A reply brief must be served and filed within 20 days after the opposing party files its brief.

(4) A party filing a brief it filed in the Court of Appeal must attach to the cover a notice of its intent to rely on the brief in the Supreme Court.

(5) The time to serve and file a brief may not be extended by stipulation but only by order of the Chief Justice under rule ~~45~~ 8.60.

(6) The court may designate which party is deemed the petitioner or otherwise direct the sequence in which the parties must file their briefs.

(b) Form and content

(1) Briefs filed under this rule must comply with the relevant provisions of rule ~~14~~ 8.204.

(2) The body of the petitioner's brief on the merits must begin by quoting either:

(A) Any order specifying the issues to be briefed; or, if none,

(B) The statement of issues in the petition for review and, if any, in the answer.

(3) Unless the court orders otherwise, briefs on the merits must be limited to the issues stated in (2) and any issues fairly included in them.

(c) Length

(1) If produced on a computer, a brief on the merits must not exceed 14,000 words and a reply brief on the merits must not exceed 4,200 words. Such a brief must include a certificate by appellate counsel or an unrepresented party stating the number of words in the brief. The person certifying may rely on the word count of the computer program used to prepare the brief.

(2) If typewritten, a brief on the merits must not exceed 50 pages and a reply brief must not exceed 15 pages.

(3) The tables, a certificate under (1), and any quotation of issues required by (b)(2) are excluded from the limits stated in (1) and (2).

(4) On application and for good cause, the Chief Justice may permit a longer brief.

(d) Supplemental briefs

(1) A party may file a supplemental brief limited to new authorities, new legislation, or other matters that were not available in time to be included in the party's brief on the merits.

(2) A supplemental brief must not exceed 2,800 words if produced on a computer or 10 pages if typewritten, and must be served and filed no later than 10 days before oral argument.

(e) Briefs on the court's request

The court may request additional briefs on any or all issues, whether or not the parties have filed briefs on the merits.

(f) Amicus curiae briefs

(1) After the court orders review, any person or entity may serve and file an application for permission of the Chief Justice to file an amicus curiae brief.

(2) The application must be filed no later than 30 days after all briefs that the parties may file under this rule—other than supplemental briefs—have been filed or were required to be filed. The Chief Justice may allow later filing if the applicant shows specific and compelling reasons for the delay.

(3) The application must state the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter.

(4) The proposed brief must be served. It must accompany the application and may be combined with it.

(5) The covers of the application and proposed brief must identify the party the applicant supports, if any.

(6) If the court grants the application, any party may file an answer within 20 days after the amicus curiae brief is filed. It must be served on all parties and the amicus curiae.

(7) The Attorney General may file an amicus curiae brief without the Chief Justice's permission unless the brief is submitted on behalf of another state officer or agency. The Attorney General must serve and file the brief within the time specified in (2) and must provide the information required by (3) and comply with (5). Any answer must comply with (6).

(g) Judicial notice

To obtain judicial notice by the Supreme Court under Evidence Code section 459, a party must comply with rule ~~22~~ 8.252(a).

Advisory Committee Comment [revised version]

Subdivisions (c) and (d). Subdivisions (c) and (d) state in terms of word count rather than page count the maximum permissible lengths of Supreme Court briefs produced on a computer. This provision tracks an identical provision in rule 8.204(c) governing Court of Appeal briefs and is explained in the advisory committee comment to that provision.

Advisory Committee Comment ~~(2003)~~ [version showing revisions]

~~Revised rule 29.1 is principally derived from former rule 29.3.~~

~~**Subdivision (a).** Former rule 29.3 prescribed two different time limits for filing mandatory briefs in the Supreme Court: 30 days if a party chose to file a new brief on the merits but only 15 days if a party chose instead to rely on the brief it previously filed in the Court of Appeal. Although it presumably requires more time to prepare a new brief on the merits than to copy a Court of Appeal brief and attach a notice of intent to rely on it, this justification for the discrepancy is insufficient to outweigh the resulting complication of the clerk's duties in administering the important matter of filing deadlines. Accordingly, in a substantive change intended to simplify the briefing process, revised rule 29.1(a)(1) and (2) provides a single time limit—30 days—for filing all mandatory briefs in the Supreme Court.~~

~~Revised subdivision (a)(3) fills a gap by giving the petitioner the option of relying on the reply brief it filed in the Court of Appeal.~~

Subdivisions (c) and (d). ~~Revised rule 29.1~~Subdivisions (c) and (d) state in terms of word count rather than page count the maximum permissible lengths of Supreme Court briefs produced on a computer. This ~~substantive change~~ provision tracks an identical provision in ~~revised~~ rule ~~14~~ 8.204(c) governing Court of Appeal briefs and is explained in the Advisory Committee Comment to that provision.

Rule 8.324. ~~29.2.~~ Oral argument and submission of the cause

(a) Application

This rule governs oral argument in the Supreme Court unless the court provides otherwise in its Internal Operating Practices and Procedures or by order.

(b) Place of argument

The Supreme Court holds regular sessions in San Francisco, Los Angeles, and Sacramento on a schedule fixed by the court, and may hold special sessions elsewhere.

(c) Notice of argument

The Supreme Court clerk must send notice of the time and place of oral argument to all parties at least 20 days before the argument date. The Chief Justice may shorten the notice period for good cause; in that event, the clerk must immediately notify the parties by telephone or other expeditious method.

(d) Sequence of argument

The petitioner for Supreme Court relief has the right to open and close. If there are two or more petitioners—or none—the court must set the sequence of argument.

(e) Time for argument

Each side is allowed 30 minutes for argument.

(f) Number of counsel

(1) Only one counsel on each side may argue—regardless of the number of parties on the side—unless the court orders otherwise on request.

(2) Requests to divide oral argument among multiple counsel must be filed within 10 days after the date of the order setting the case for argument.

(3) Multiple counsel must not divide their argument into segments of less than 10 minutes per person, except that one counsel for the opening side—or more, if authorized by the Chief Justice on request—may reserve any portion of that counsel's time for rebuttal.

(g) Argument by amicus curiae

An amicus curiae is not entitled to argument time but may ask a party for permission to use a portion or all of the party's time, subject to the 10-minute minimum prescribed in (f)(3). If permission is granted, counsel must file a request under (f)(2).

(h) Submission of the cause

(1) A cause is submitted when the court has heard oral argument or approved its waiver and the time has expired to file all briefs and papers, including any supplemental brief permitted by the court.

(2) The court may vacate submission only by an order stating the court's reasons and setting a timetable for resubmission.

Advisory Committee Comment [revised version]

Subdivision (d). In subdivision (d), "The petitioner for Supreme Court relief" can be a petitioner for review, a petitioner for transfer (rule 8.352), a petitioner in an original proceeding in the Supreme Court, or a party designated as petitioner in a proceeding on request of a court of another jurisdiction (rule 8.348(b)(1)).

The number of petitioners is "none" when the court grants review on its own motion or transfers a cause to itself on its own motion.

Subdivision (e). The time allowed for argument in death penalty appeals is prescribed in rule 8.538.

Subdivision (f). The number of counsel allowed to argue on each side in death penalty appeals is prescribed in rule 8.538.

Advisory Committee Comment ~~(2003)~~ [version showing revisions]

~~Revised rule 29.2 is principally derived from former rule 22.~~

~~**Subdivision (b).** Revised subdivision (b) is the first sentence of former rule 21(a). The former rule also provided that a motion filed in the Supreme Court would be decided without oral argument but could be placed on calendar by the Chief Justice. The revised rule deletes this provision because the topic is covered in the general rule on motions in the reviewing court. (See rule 41.)~~

~~**Subdivision (c).** Revised subdivision (c) fills a gap. It is based on revised rule 23(b) and is discussed in the Advisory Committee Comment to that rule. The practice of the Supreme Court is to give the parties at least 30 days' notice of the oral argument date.~~

Subdivision (d). ~~Revised subdivision (d) is former rule 22(c).~~In subdivision (d), "The petitioner for Supreme Court relief" can be a petitioner for review, a petitioner for transfer (~~revised~~ rule ~~29.9~~ 8.352), a petitioner in an original proceeding in the Supreme Court, or a party designated as petitioner in a proceeding on request of a court of another jurisdiction (~~revised~~ rule ~~29.8~~ 8.348(b)(1)).

The number of petitioners is "none" when the court grants review on its own motion or transfers a cause to itself on its own motion.

Subdivision (e). The time allowed for argument in death penalty appeals is prescribed in ~~new~~ rule ~~36.2~~ 8.538.

Subdivision (f). The number of counsel allowed to argue on each side in death penalty appeals is prescribed in ~~new~~ rule ~~36.2~~ 8.538.

~~Revised subdivision (f)(3) is based on section V of the court's Internal Operating~~ Practices and Procedures.

~~**Subdivision (g).** Revised subdivision (g) fills a gap by specifying how amici curiae may seek argument time. It states the Supreme Court practice on the topic.~~

~~**Subdivision (h).** Revised subdivision (h) is based on section VII of the court's Internal Operating Practices and Procedures.~~

Rule 8.328. ~~29.3.~~ Disposition ~~of causes~~

(a) Normal disposition

After review, the Supreme Court normally will affirm, reverse, or modify the judgment of the Court of Appeal, but may order another disposition.

(b) Dismissal of review

(1) The Supreme Court may dismiss review. The Supreme Court clerk must promptly send an order dismissing review to all parties and the Court of Appeal.

(2) When the Court of Appeal receives an order dismissing review, the decision of that court is final and its clerk must promptly issue a remittitur or take other appropriate action.

(3) After an order dismissing review, the Court of Appeal opinion remains unpublished unless the Supreme Court orders otherwise.

(c) Remand for decision on remaining issues

If it decides fewer than all the issues presented by the case, the Supreme Court may remand the cause to a Court of Appeal for decision on any remaining issues.

(d) Transfer without decision

After ordering review, the Supreme Court may transfer the cause to a Court of Appeal without decision but with instructions to conduct such proceedings as the Supreme Court orders.

(e) Retransfer without decision

After transferring to itself, before decision, a cause pending in the Court of Appeal, the Supreme Court may retransfer the cause to a Court of Appeal without decision.

(f) Court of Appeal briefs after remand or transfer

Any supplemental briefing in the Court of Appeal after remand or transfer from the Supreme Court is governed by rule ~~13~~ 8.200(b).

Advisory Committee Comment [revised version]

Subdivision (a). Subdivision (a) serves two purposes. First, it declares that the Supreme Court's normal disposition of a cause after completing its review is to affirm, reverse, or modify *the judgment of the Court of Appeal*. Second, the subdivision recognizes that, when necessary, the Supreme Court may order "another disposition" appropriate to the circumstances. Subdivisions (b)–(e) provide examples of such "other dispositions," but the list is not intended to be exclusive.

As used in subdivision (a), "the judgment of the Court of Appeal" includes a decision of that court denying a petition for original writ without issuing an alternative writ or order to show cause. The Supreme Court's method of disposition after reviewing such a decision, however, has evolved. In earlier cases the Supreme Court itself denied or granted the requested writ, in effect treating the matter as if it were an original proceeding in the Supreme Court. (E.g., *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 58 ["The alternative writ of mandate is discharged and the petition for a peremptory writ of mandate is denied."].) By contrast, current Supreme Court practice is to affirm or reverse the judgment of the Court of Appeal summarily denying the writ petition. (E.g., *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 742–743 ["The judgment of the Court of Appeal is reversed with directions to vacate its order denying the petition, and to issue a writ of mandate . . . ."]; *State Comp. Ins. Fund v. Superior Court* (2001) 24 Cal.4th 930, 944 ["The judgment of the Court of Appeal summarily denying the petition for writ of mandate is affirmed and the order to show cause . . . is discharged."].) As the cited cases illustrate, if the Supreme Court affirms such a judgment it will normally discharge any alternative writ or order to show cause it issued when granting review; if the court reverses the judgment it will normally include a direction to the Court of Appeal, e.g., to issue the requested writ or to reconsider the petition.

Subdivision (b). An earlier version of this rule purported to limit Supreme Court *dismissals of review* to cases in which the court had "improvidently" granted review. In practice, however, the court may dismiss review for a variety of other reasons. For example, after the court decides a "lead" case, its current practice is to dismiss review in any pending companion case (i.e., a "grant and hold" matter under rule 8.312(c)) that appears correctly decided in light of the lead case and presents no additional issue requiring resolution by the Supreme Court or the Court of Appeal. The Supreme Court may also dismiss review when a supervening event renders the case moot for any reason, e.g., when the parties reach a settlement, when a party seeking personal relief dies, or when the court orders review to construe a statute that is then repealed before the court can act. Reflecting this practice, the Supreme Court now dismisses review—even in the rare case in which the grant of review was arguably "improvident"—by an order that says simply that "review is dismissed."

An order of review ipso facto transfers jurisdiction of the cause to the Supreme Court. By the same token, an order dismissing review ipso facto retransfers jurisdiction to the Court of Appeal. The Court of Appeal has no discretion to exercise after the Supreme Court dismisses review: the Supreme Court clerk must promptly send the dismissal order to the Court of Appeal; when the Court of Appeal clerk files that order, the Court of Appeal decision immediately becomes final.

If the decision of the Court of Appeal made final by subdivision (b)(2) requires issuance of a remittitur under rule 8.272(a), the clerk must issue the remittitur; if the decision does not require issuance of a

remittitur—e.g., if the decision is an interlocutory order (see rule 8.300(a)(1))—the clerk must take whatever action is appropriate in the circumstances.

Subdivision (d). Subdivision (d) is intended to apply primarily to two types of cases: (1) those in which the court granted review "for the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order" (rule 8.300(b)(4)) and (2) those in which the court, after deciding a "lead case," determines that a companion "grant and hold" case (rule 8.312(c)) should be reconsidered by the Court of Appeal in light of the lead case or presents an additional issue or issues that require resolution by the Court of Appeal.

Subdivision (e). Subdivision (e) is intended to apply to cases in which the Supreme Court, after *transferring* to itself before decision a cause pending in the Court of Appeal, *retransfers* the matter to that court without decision and with or without instructions.

Advisory Committee Comment ~~(2003)~~ [version showing revisions]

~~Revised rule 29.3 is former rule 29.4.~~

Subdivision (a). ~~Like former rule 29.4(a), revised rule 29.3~~ Subdivision (a) serves two purposes. First, it declares that the Supreme Court's normal disposition of a cause after completing its review is to affirm, reverse, or modify *the judgment of the Court of Appeal*. Second, the subdivision recognizes that, when necessary, the Supreme Court may order "another disposition" appropriate to the circumstances. ~~Like former rule 29.4(b)–(e), revised rule 29.3~~ Subdivisions (b)–(e) provide examples of such "other dispositions," but the list is not intended to be exclusive.

As used in ~~former and revised~~ subdivision~~s~~ (a), "the judgment of the Court of Appeal" includes a decision of that court denying a petition for original writ without issuing an alternative writ or order to show cause. ~~(See former rule 24(a) and revised rule 24(b)(2)(A).)~~ The Supreme Court's method of disposition after reviewing such a decision, however, has ~~recently~~ evolved. In earlier cases the Supreme Court itself denied or granted the requested writ, in effect treating the matter as if it were an original proceeding in the Supreme Court. (E.g., *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 58 ["The alternative writ of mandate is discharged and the petition for a peremptory writ of mandate is denied."].) By contrast, current Supreme Court practice is to affirm or reverse the judgment of the Court of Appeal summarily denying the writ petition. (E.g., *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 742–743 ["The judgment of the Court of Appeal is reversed with directions to vacate its order denying the petition, and to issue a writ of mandate . . . ."]; *State Comp. Ins. Fund v. Superior Court* (2001) 24 Cal.4th 930, 944 ["The judgment of the Court of Appeal summarily denying the petition for writ of mandate is affirmed and the order to show cause . . . is discharged."].) As the cited cases illustrate, if the Supreme Court affirms such a judgment it will normally discharge any alternative writ or order to show cause it issued when granting review; if the court reverses the judgment it will normally include a direction to the Court of Appeal, e.g., to issue the requested writ or to reconsider the petition.

Subdivision (b). ~~Revised subdivision (b) is former rule 29.4(c). The former~~ An earlier version of this rule purported to limit Supreme Court *dismissals of review* to cases in which the court had "improvidently" granted review. In practice, however, the court may dismiss review for a variety of other reasons. For example, after the court decides a "lead" case, its current practice is to dismiss review in any pending companion case (i.e., a "grant and hold" matter under ~~revised~~ rule ~~28.2~~ 8.312(c)) that appears correctly decided in light of the lead case and presents no additional issue requiring resolution by the Supreme Court or the Court of Appeal. The Supreme Court may also dismiss review when a supervening event

renders the case moot for any reason, e.g., when the parties reach a settlement, when a party seeking personal relief dies, or when the court orders review to construe a statute that is then repealed before the court can act. Reflecting this practice, the Supreme Court now dismisses review—even in the rare case in which the grant of review was arguably "improvident"—by an order that says simply that "review is dismissed.", ~~"Pursuant to rule 29.4 8.332(c) [now 29.3 8.328(b)], California Rules of Court, the above-entitled review is DISMISSED . . . ." Revised subdivision (b) follows this practice by deleting as misleading the former reference to "improvident" grants of review. It is not a substantive change.~~

~~Former rule 29.4(c) also directed the Supreme Court, after dismissing review, to "remand the cause to the Court of Appeal." In effect, however, the directive was superfluous. In the rule authorizing the court to *order* review (former rule 28(a), revised rule 28.2(b)) there is no parallel provision directing the court to *transfer* the case to itself after ordering review, and the reason is evident:~~ An order of review ipso facto transfers jurisdiction of the cause to the Supreme Court. By the same token, an order dismissing review ipso facto retransfers jurisdiction to the Court of Appeal. The Court of Appeal has no discretion to exercise after the Supreme Court dismisses review: ~~under both former rule 29.4(c) and revised rule 29.3(b),~~ the Supreme Court clerk must promptly send the dismissal order to the Court of Appeal; when the Court of Appeal clerk files that order, the Court of Appeal decision immediately becomes final. ~~and the Court of Appeal clerk must promptly issue the remittitur. Revised subdivision (b)(1) therefore deletes as superfluous the directive to the Supreme Court to "remand the cause to the Court of Appeal" upon dismissal of review, because that consequence follows automatically from the order dismissing review. It is not a substantive change.~~

~~Former rule 29.4(c) provided that the Court of Appeal decision was final when the Supreme Court dismissal order was *filed* in the Court of Appeal. It is the practice of Court of Appeal clerks, however, not to *file* such orders—which have already been filed in the Supreme Court (see revised subd. (b)(1))—but simply to mark them *received* and make the appropriate docket entry. To reflect that practice, revised rule 29.3(b)(2) provides that the Court of Appeal decision is final when that court "receives" the order dismissing review.~~

If the decision of the Court of Appeal made final by subdivision (b)(2) requires issuance of a remittitur under ~~revised~~ rule ~~26~~ 8.272(a), the clerk must issue the remittitur; if the decision does not require issuance of a remittitur—e.g., if the decision is an interlocutory order (see ~~revised~~ rule ~~28~~ 8.300(a)(1))—the clerk must take whatever action is appropriate in the circumstances.

~~**Subdivision (c).** Revised subdivision (c) is former rule 29.4(b). The former rule applied when the Supreme Court decided "one or more"—implying fewer than all—issues in the case; revised subdivision (c) applies when the Supreme Court decides "fewer than all the issues presented by the case," i.e., fewer than (i) the issues "raised in the petition or answer or fairly included in those issues" (revised rule 29(b)(1)) and (ii) any other issue raised on the court's own motion (*id*., subd. (b)(2)). The purpose is to clarify the scope of the former rule; no substantive change is intended.~~

~~Former rule 29.4(b) authorized the Supreme Court to *transfer* the cause to the Court of Appeal for decision on any remaining issues in the appeal. In practice, however, the Supreme Court does not file a separate order "transferring" the cause to the Court of Appeal in such cases; instead, as part of its appellate judgment at the end of its opinion the court simply orders the cause *remanded* to the Court of Appeal for disposition of the remaining issues. (See, e.g., *People v. Willis (*2002) 27 Cal.4th 811, 825.) Consistently with this practice, revised rule 29.3(c) provides that the Supreme Court may "remand" such a cause to the Court of Appeal for decision on any remaining issues. The change is not substantive.~~

Subdivision (d). ~~Revised subdivision (d) is former rule 29.4(c). Like the former rule, it~~ Subdivision (d) is intended to apply primarily to two types of cases: (~~i~~1) those in which the court granted review "for the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order" (~~revised~~ rule ~~28~~ 8.300(b)(4)) and (~~ii~~2) those in which the court, after deciding a "lead case," determines that a companion "grant and hold" case (~~revised~~ rule ~~28.2~~ 8.312(c)) should be reconsidered by the Court of Appeal in light of the lead case or presents an additional issue or issues that require resolution by the Court of Appeal.

Subdivision (e). ~~Revised subdivision (e) is former rule 29.4(d). Like the former rule, it~~ Subdivision (e) is intended to apply to cases in which the Supreme Court, after *transferring* to itself before decision a cause pending in the Court of Appeal, *retransfers* the matter to that court without decision and with or without instructions. ~~The former rule, however, purported to limit such retransfers to cases in which the Supreme Court had "improvidently" transferred the cause to itself in the first instance. For reasons similar to those discussed under subdivision (b) of this Comment, revised subdivision (e) deletes as misleading the former reference to "improvident" transfers. It is not a substantive change.~~

~~**Subdivision (f).** Former subdivision (f), relating to supplemental briefs in the Court of Appeal after a cause is transferred from the Supreme Court, has been moved to new subdivision (b) of rule 13. Revised subdivision (f) provides the cross-reference.~~

Rule 8.332. ~~29.4.~~ Filing, finality, and modification of decision

(a) Filing the decision

The Supreme Court clerk must promptly file all opinions and orders issued by the court and promptly send copies showing the filing date to the parties and, when relevant, to the lower court or tribunal.

(b) Finality of decision

(1) Except as provided in (2), a Supreme Court decision is final 30 days after filing unless:

(A) The court orders a shorter period~~,~~; or

(B) Before the 30-day period or any extension expires the court orders one or more extensions, not to exceed a total of 60 additional days.

(2) The following Supreme Court decisions are final on filing:

(A) The denial of a petition for review of a Court of Appeal decision;

(B) A disposition ordered under rule ~~29.3~~ 8.328(b), (d), or (e);

(C) The denial of a petition for a writ within the court's original jurisdiction without issuance of an alternative writ or order to show cause; and

(D) The denial of a petition for writ of supersedeas.

(c) Modification of decision

The Supreme Court may modify a decision as provided in rule ~~24~~ 8.264(c).

Advisory Committee Comment [revised version]

Subdivision (b). Subdivision (b)(2)(A) recognizes the general rule that the denial of a petition for review of a Court of Appeal decision is final on filing. Subdivision (b)(2)(B)–(D) recognizes several additional types of Supreme Court decisions that are final on filing. Thus subdivision (b)(2)(B) recognizes that a dismissal, a transfer, and a retransfer under subdivisions (b), (d), and (e), respectively, of rule 8.328 are decisions final on filing. A remand under subdivision (c) of rule 8.328 is not a decision final on filing because it is not a separately filed order; rather, as part of its appellate judgment at the end of its opinion in such cases the Supreme Court simply orders the cause remanded to the Court of Appeal for disposition of the remaining issues in the appeal.

Subdivision (b)(2)(C) recognizes that an order denying a petition for a writ within the court's original jurisdiction without issuance of an alternative writ or order to show cause is final on filing. The provision reflects the settled Supreme Court practice, since at least 1989, of declining to file petitions for rehearing in such matters. (See, e.g., In re Hayes (S004421) Minutes, Cal. Supreme Ct., July 28, 1989 ["The motion to vacate this court's order of May 18, 1989 [denying a petition for habeas corpus without opinion] is denied. Because the California Rules of Court do not authorize the filing of a petition for rehearing of such an order, the alternate request to consider the matter as a petition for rehearing is denied."].)

Subdivision (b)(2)(D) recognizes that an order denying a petition for writ of supersedeas is final on filing.

Advisory Committee Comment ~~(2003)~~ [version showing revisions]

~~Revised rule 29.4 is principally derived from former rule 24.~~

Subdivision (b). ~~Filling gaps in the rule consistently with Supreme Court practice, revised rule 29.4~~Subdivision (b)(2)(A) recognizes the general rule that the denial of a petition for review of a Court of Appeal decision is final on filing. Subdivision (b)(2)(B)–(D) recognizes several additional types of Supreme Court decisions that are final on filing. Thus ~~revised~~ subdivision (b)(2)(B) recognizes that a dismissal, a transfer, and a retransfer under subdivisions (b), (d), and (e), respectively, of ~~revised~~ rule ~~29.3~~ 8.328 are decisions final on filing. A remand under subdivision (c) of ~~revised~~ rule ~~29.3~~ 8.328 is not a decision final on filing because it is not a separately filed order; rather, as part of its appellate judgment at the end of its opinion in such cases the Supreme Court simply orders the cause remanded to the Court of Appeal for disposition of the remaining issues in the appeal. ~~(See Advisory Committee Comment to revised rule 29.3(c).)~~

~~Revised~~ Subdivision (b)(2)(C) recognizes that an order denying a petition for a writ within the court's original jurisdiction without issuance of an alternative writ or order to show cause is final on filing. The provision reflects the settled Supreme Court practice, since at least 1989, of declining to file petitions for

rehearing in such matters. (See, e.g., In re Hayes (S004421) Minutes, Cal. Supreme Ct., July 28, 1989 ["The motion to vacate this court's order of May 18, 1989 [denying a petition for habeas corpus without opinion] is denied. Because the California Rules of Court do not authorize the filing of a petition for rehearing of such an order, the alternate request to consider the matter as a petition for rehearing is denied."].)

~~Finally, revised~~ Subdivision (b)(2)(D) recognizes that an order denying a petition for writ of supersedeas is final on filing.

Rule 8.336. ~~29.5.~~ Rehearing

(a) Power to order rehearing

The Supreme Court may order rehearing as provided in rule ~~25~~ 8.268(a).

(b) Petition and answer

A petition for rehearing and any answer must comply with rule ~~25~~ 8.268(b)(1) and (3). Any answer to the petition must be served and filed within ~~8~~ eight days after the petition is filed. Before the Supreme Court decision is final and for good cause, the Chief Justice may relieve a party from a failure to file a timely petition or answer.

(c) Extension of time

The time for granting or denying a petition for rehearing in the Supreme Court may be extended under rule ~~29.4~~ 8.332(b)(1)(B). If the court does not rule on the petition before the decision is final, the petition is deemed denied.

(d) Determination of petition

An order granting a rehearing must be signed by at least four justices; an order denying rehearing may be signed by the Chief Justice alone.

(e) Effect of granting rehearing

An order granting a rehearing vacates the decision and any opinion filed in the case and sets the cause at large in the Supreme Court.

~~Advisory Committee Comment (2003)~~

~~Revised rule 29.5 is derived from former rule 27.~~

~~Subdivision (a).~~ ~~Former rule 27(a) listed certain cases in which the Court of Appeal could not order rehearing, but the provision omitted Supreme Court practice entirely: the Supreme Court also declines to entertain petitions for rehearing in several types of cases that are final in that court on filing: i.e., denial of~~

~~review; dispositions under revised rule 29.3(b), (d), or (e); denial of a writ petition without issuing an alternative writ or order to show cause; and denial of supersedeas. (See revised rule 29.4(b)(2).) To fill this gap, revised rule 29.5(a) declares simply that the Supreme Court may order rehearing as provided in revised rule 25(a), i.e., it may order rehearing of any decision that is not final on filing (under revised rule 29.4). It is not a substantive change.~~

~~**Subdivision (b).** Revised rule 29.5(b) incorporates by reference portions of revised rule 25(b), which make a number of substantive changes explained in the Advisory Committee Comment to that rule. Revised rule 25(b)(1)(C), referring to the effect of a *publication order* on finality, is inapplicable to Supreme Court practice; all Supreme Court opinions are published.~~

~~**Subdivision (c).** The first sentence of revised subdivision (c) restates a provision appearing in rule 45(c). The second sentence restates a provision of former rule 27(e); in doing so, the revised subdivision deletes as superfluous the directive to the clerk to "enter a notation in the register" that a petition for rehearing is deemed denied because it was not ruled on before finality. It is assumed that in the rare case in which the situation may arise the clerk will routinely enter such a notation. The change is not substantive.~~

~~**Subdivision (e).** For purposes of completeness, revised subdivision (e) states the case law on the effect of ordering rehearing. It is not a substantive change.~~

Rule 8.340. ~~29.6.~~ Remittitur

(a) Proceedings requiring issuance of remittitur

The Supreme Court must issue a remittitur after a decision in:

(1) A review of a Court of Appeal decision; or

(2) An appeal from a judgment of death or in a cause transferred to the court under rule ~~29.9~~ 8.352.~~; or~~

~~(3) an original proceeding, except when the court denies a writ petition without issuing an alternative writ or order to show cause.~~

(b) Clerk's duties

(1) The clerk must issue a remittitur when a decision of the court is final. The remittitur is deemed issued when the clerk enters it in the record.

(2) After review of a Court of Appeal decision, the Supreme Court clerk must address the remittitur to the Court of Appeal and send that court two copies of the remittitur and two file-stamped copies of the Supreme Court opinion or order.

(3) After a decision in an appeal from a judgment of death~~, in an original proceeding in the Supreme Court,~~ or in a cause transferred to the court under rule ~~29.9~~ 8.352, the clerk must send the remittitur and a file-stamped copy of the Supreme Court opinion or order to the lower court or tribunal.

(4) The clerk must comply with the requirements of rule ~~26~~ 8.272(d).

(c) Immediate issuance, stay, and recall

(1) The Supreme Court may direct immediate issuance of a remittitur on the parties' stipulation or for good cause.

(2) On a party's or its own motion and for good cause, the court may stay a remittitur's issuance for a reasonable period or order its recall.

(3) An order recalling a remittitur issued after a decision by opinion does not supersede the opinion or affect its publication status.

~~**Advisory Committee Comment (2003)**~~

~~Revised rule 29.6 is derived from former rule 25.~~

~~**Subdivision (a).** The wording of revised rule 29.6(a)(3) tracks that of revised rule 26(a)(2) and is explained in the Advisory Committee Comment to that rule.~~

~~**Subdivision (b).** In a substantive change, revised subdivision (b)(2)–(3) deletes the requirement of former rule 25(a) that the Supreme Court clerk "certify" the copies of that court's opinion that accompany its remittitur. To the extent the provision has been read to require the clerk to stamp the attached opinion with the seal of the court, it is obsolete. That practice presumably served the purpose of ensuring that the opinion that the clerk sent to the lower court or tribunal was in fact the opinion filed by the court. The concern is no longer valid: in current practice, by the time the remittitur issues—30 days after the opinion is filed—the opinion has already been published both on the California Courts Web site and in the official advance sheets, where its text can be compared in case of any doubt. But to the extent the provision has also been read to require the clerk to declare in the remittitur that he or she "certifies" that the attached opinion is a copy of the original opinion, it is not obsolete. Although the revised rule does not use the word "certified" because of its possible ambiguity, the rule is not intended to change the latter practice.~~

~~Revised subdivision (b)(2)–(3) requires the Supreme Court clerk to file-stamp the copies of the opinion that accompany the remittitur. Although the former rule did not expressly so provide, it is not a substantive change: file-stamping such opinions is the current practice of the Supreme Court clerk.~~

~~Revised subdivision (b)(3) fills a gap by stating the current Supreme Court practice in death penalty cases, in original writ cases in that court, and in causes that the Supreme Court transfers to itself before decision in the Court of Appeal (revised rule 29.9). It is not a substantive change.~~

~~**Subdivision (c).** Former rule 25(c) was silent on the question of whether a party wanting the Supreme Court to stay the issuance of its remittitur was required to serve and file a motion for that relief. Revised rule 29.6(c)(2), which combines the provisions for both staying and recalling a remittitur, makes it clear that such a motion is necessary. No substantive change is intended.~~

~~Former rule 25(d) provided that a reviewing court could recall a remittitur "on stipulation setting forth facts which would justify the granting of a motion" to recall. Revised rule 29.6(c)(2) deletes the quoted provision as redundant: if the parties are able to stipulate to facts that would justify granting a motion to recall, they need only file such a motion and attach the stipulation. No substantive change is intended.~~

~~Former rule 25(d) did not expressly require good cause for a reviewing court to recall a remittitur on a party's or its own motion. In accord with the case law, revised rule 29.6(c)(2) states this requirement expressly; it is not a substantive change. Also in accord with the case law, "good cause" as used in revised subdivision (c)(2) has substantially different meanings depending on whether it is applied to a stay or to a recall of a remittitur. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 735–741, pp. 764–771.)~~

~~For purposes of completeness, revised subdivision (c)(3) states the case law on the effect of the recall of a remittitur. It is not a substantive change.~~

~~**Former rule 29.6.** Former rule 29.6, a transitional provision, is repealed, having served its purpose.~~

(Reviser's note: Subdivision (a)(3) has been deleted, and subdivision (b)(3) has been amended, to conform to Supreme Court practice.)

Rule 8.344. ~~29.7.~~ Costs and sanctions

In a civil case, the Supreme Court may direct the Court of Appeal to award costs, if any; or may order the parties to bear their own costs; or may make any other award of costs the Supreme Court deems proper. The Supreme Court may impose sanctions on a party or an attorney under rule ~~27~~ 8.276(e) for committing any unreasonable violation of these rules.

Advisory Committee Comment [revised version]

If the Supreme Court makes an award of costs, the party claiming such costs must proceed under rule 8.276(d).

Advisory Committee Comment ~~(2003)~~ [version showing revisions]

~~Revised rule 29.7 is new; it states current Supreme Court practice with respect to costs and sanctions, and is therefore not a substantive change.~~

If the Supreme Court makes an award of costs, the party claiming such costs must proceed under ~~revised~~ rule ~~27~~ 8.276(d).

Rule 8.348. ~~29.8.~~ Decision on request of a court of another jurisdiction

(a) Request for decision

On request of the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, the Supreme Court may decide a question of California law if:

(1) The decision could determine the outcome of a matter pending in the requesting court~~,~~; and

(2) There is no controlling precedent.

(b) Form and contents of request

The request must take the form of an order of the requesting court containing:

(1) The title and number of the case, the names and addresses of counsel and any unrepresented party, and a designation of the party to be deemed the petitioner if the request is granted;

(2) The question to be decided, with a statement that the requesting court will accept the decision;

(3) A statement of the relevant facts prepared by the requesting court or by the parties and approved by the court; and

(4) An explanation of how the request satisfies the requirements of (a).

(c) Supporting materials

Copies of all relevant briefs must accompany the request. At any time, the Supreme Court may ask the requesting court to furnish additional record materials, including transcripts and exhibits.

(d) Serving and filing the request

The requesting court clerk must file an original and 10 copies of the request in the Supreme Court with a certificate of service on the parties.

(e) Letters in support or opposition

(1) Within 20 days after the request is filed, any party or other person or entity wanting to support or oppose the request must send a letter to the Supreme Court, with service on the parties and on the requesting court.

(2) Within 10 days after service of a letter under (1), any party may send a reply letter to the Supreme Court, with service on the other parties and the requesting court.

(3) A letter or reply asking the court to restate the question under (f)(5) must propose new wording.

(f) Proceedings in Supreme Court

(1) In exercising its discretion to grant or deny the request, the Supreme Court may consider whether resolution of the question is necessary to secure uniformity of decision or to settle an important question of law, and any other factor the court deems appropriate.

(2) An order granting the request must be signed by at least four justices; an order denying the request may be signed by the Chief Justice alone.

(3) If the court grants the request, the rules on review and decision in the Supreme Court govern further proceedings in that court.

(4) If, after granting the request, the court determines that a decision on the question may require an interpretation of the California Constitution or a decision on the validity or meaning of a California law affecting the public interest, the court must direct the clerk to send to the Attorney General—unless the Attorney General represents a party to the litigation—a copy of the request and the order granting it.

(5) At any time, the Supreme Court may restate the question or ask the requesting court to clarify the question.

(6) After filing the opinion, the clerk must promptly send file-stamped copies to the requesting court and the parties and must notify that court and the parties when the decision is final.

(7) Supreme Court decisions pursuant to this rule are published in the Official Reports and have the same precedential effect as the court's other decisions.

~~**Advisory Committee Comment (2003)**~~

~~Revised rule 29.8 is former rule 29.5. The revision serves three main purposes: (1) to integrate the rule more fully into the California Rules of Court by deleting provisions that duplicated other revised rules; (2) to simplify and update the rule by deleting provisions based on similar laws of other states that have not become part of Supreme Court practice under this rule; and (3) to clarify and facilitate use of the rule~~

by recasting certain of its provisions in terms parallel to those of the longstanding and better-known rules governing petitions for review (revised rules 28–28.2). Few of the changes, however, are substantive.

To emphasize that the rule is not intended to authorize the Supreme Court to issue an improper advisory opinion in a case brought under its provisions, revised rule 29.8 no longer describes the Supreme Court's action on a request to settle a point of California law as merely an *answer* to a question, but as a *decision* on that point of law.

Under the former rule, a court of another jurisdiction that requested the Supreme Court to decide a question of California law was also required to "certify" its question to the Supreme Court. (E.g., former rule 29.5(d).) Revised rule 29.8 deletes this requirement as an unnecessary formalism. The "certification" requirement apparently served the purpose of guaranteeing that the request was authentic. But the same purpose is served equally well by the more fundamental requirement – imposed by both the former and revised rules – that the request must be presented to the Supreme Court by a formal *order* of the requesting court. (Revised rule 29.8(b).) Such an order is manifestly a sufficient guarantee of authenticity. The change is more one of terminology than of substance.

Subdivision (a). Former rule 29.5(a) stated three prerequisites for Supreme Court action on a certified question. The first was that "the certifying court requests the answer." Revised rule 29.8 deletes this requirement as redundant: because the rule does not contemplate the Supreme Court's taking the highly improbable step of acting on its own motion to provide a court of another jurisdiction with a decision on a question of California law that that court has not asked for, *every* such decision of the Supreme Court will necessarily come in response to a request by a court of another jurisdiction.

Former rule 29.5(a) described an additional prerequisite as follows: "the *decisions of the California appellate courts* provide no controlling precedent concerning the certified question." (Italics added.) Revised rule 29.8 deletes the italicized language as redundant: in all cases, only decisions of the California Supreme Court and published decisions of the California Court of Appeal are precedents in California case law.

Subdivision (b). Former rule 29.5(b)(4) included, among the required contents of a request, a statement "demonstrating that the question certified is contested," presumably meaning contested by the parties. Revised rule 29.8(b) deletes this "demonstration" as unnecessary and inappropriate. Former rule 29.5(a) did not include this requirement among its prerequisites for Supreme Court action, nor should it have done so. The purpose of the requirements of subdivision (a) was to ensure that the Supreme Court did not render an improper advisory opinion; but that purpose is fully served by requiring that the court's decision "could determine the outcome of a matter pending in the requesting court and . . . there is no controlling precedent" (revised rule 29.8(a)), coupled with an assurance that "the requesting court will accept the decision" (id., subd. (b)(2)). Although in most cases the question may in fact be contested by the parties, that fact should not be transformed into an additional prerequisite for Supreme Court action: like any appellate court, a requesting court is not bound by an implied or even express agreement by the parties as to what the law – of California or elsewhere – is on a dispositive point; that responsibility remains the court's. And if the requesting court determines that it needs the Supreme Court's guidance on any point of California law, it may undoubtedly present the request to the Supreme Court on its own motion. (See, e.g., *Nuccio v. Nuccio* (1st Cir. 1995) 62 F.3d 14, 18; *Globe Newspaper Co. v. Beacon Hill Architectural Com.* (1st Cir. 1994) 40 F.3d 18, 24.)

Subdivision (c). Former rule 29.5(c) required the requesting court to furnish "*legible* copies of all relevant briefs [italics added]." Revised rule 29.8(c) deletes the adjective "legible" as superfluous: as in

~~the case of briefs on the merits (revised rule 29.1), the legibility of briefs presented to the Supreme Court may be assumed and in any event is a matter to be dealt with by the clerk's office.~~

~~Former rule 29.5(c) also authorized the Supreme Court to ask the requesting court to furnish additional record materials "that, in the opinion of the [Supreme] court, may be useful in answering the certified question." Revised rule 29.8(c) deletes the qualification as superfluous: it may be assumed that the Supreme Court will not ask for useless material.~~

~~**Subdivision (d).** Former rule 29.5(d) purported to prescribe specific procedures by which the requesting court was required to formalize its request, e.g., requiring "[t]he judge or justice presiding at the certification hearing (if any)" to sign the request and the clerk of that court to forward the request "under its official seal." Revised rule 29.8(d) deletes these provisions because they are intrusive and unnecessary: as noted above, the requirement that the request take the form of an *order* of the requesting court (revised subd. (b)) is a sufficient guarantee of its authenticity. Revised subdivision (d) does, however, fill a gap by directing the requesting court clerk to file an original and 10 copies of the request – the number needed by the Supreme Court for processing the request.~~

~~**Subdivision (e).** Former rule 29.5(e) required any party wanting to support or oppose a request to do so by the formal procedure of *filing a brief* for that purpose. In a substantive change intended to simplify and expedite the process, revised rule 29.8(e) deletes this formal briefing requirement and provides instead for a party to express such views by *sending a letter* to the Supreme Court. If the Supreme Court grants the request, the party will have full opportunity to file a brief on the merits (revised rule 29.1, incorporated by reference in revised rule 29.8(f)(3)); no purpose is served by requiring *two* rounds of briefing.~~

~~The foregoing change makes revised rule 29.8(e) consistent with revised rule 28(g), which provides a similar letter procedure for persons or entities wanting to support or oppose a petition for review. But because there is no provision in revised rule 29.8 comparable to an answer or reply to a petition for review, revised rule 29.8(e)(2) – like former rule 29.5(e)(4) – allows a party 10 days to *reply* to a letter supporting or opposing a request. (Compare revised rule 29.1(f)(6) [reply to amicus curiae brief on the merits].) And to provide the Supreme Court with a broad range of views on the matter, revised rule 29.8(e)(1) is not limited to letters by parties but also allows letters by any "other person or entity" wishing to be heard. (Compare revised rule 28(g)(1) [amicus curiae letters by "[a]ny person or entity"].)~~

~~**Subdivision (f).** Revised rule 29.8(f) collects in one subdivision the provisions of the former rule governing proceedings in the Supreme Court after a request is presented (former rule 29.5(f)–(*l*)).~~

~~Former rule 29.5(f) declared that the Supreme Court may *accept* or deny a request of this nature; revised 29.8(f)(1) provides instead that the court may *grant* or deny such a request. This minor change in terminology is intended to make the rule consistent with the rules authorizing the court to grant or deny *review* (see, e.g., revised rule 28.2(b)(2)). No reason appears to use a different term in proceedings under the present rule.~~

~~Revised rule 29.8(f)(1) also restates and simplifies the factors that the Supreme Court may consider in deciding whether to grant or deny the request. Consistently with current Supreme Court practice, the revised subdivision focuses on the factors that the court considers in deciding whether to grant or deny review (revised rule 28(b)(1)) and states those factors explicitly to promote clarity. Because those factors are, in practice, the court's primary concern in deciding whether to grant or deny a request under this rule, and because the court has absolute discretion to grant or deny such a request for any reason, the revised~~

~~subdivision places all other possible factors into the category of "any other factor the court deems appropriate" (see also former rule 29.5(f)(4)). The change is not substantive.~~

~~Former rule 29.5(h) required the Supreme Court to "*announce* [its decision to grant a request] in the manner that it *announces* the acceptance of cases for review [italics added]." Revised rule 29.8 deletes this requirement as superfluous if it refers to a true public "announcement" of the court's action: the court's practice is to file all orders granting review, then enter them in its minutes, and then "announce," in a summary form in a weekly press release, the cases in which it granted review. In the alternative, the requirement is ambiguous if it refers to the *content* of the order by which the court grants or denies review: to clarify any such ambiguity, revised rule 29.8(f)(2) uses the same language as revised rule 28.2(b)(2), i.e., that an order granting review—or a request under revised rule 29.8—must be signed by at least four justices, but an order denying review—or such a request—may be signed by the Chief Justice alone.~~

~~Former rule 29.5(h)(2) provided elaborate directives on awarding "fees and costs" in cases heard under this rule. Revised rule 29.8(f) deletes those directives as inappropriate because the Supreme Court imposes no filing—or any other—*fees* in such cases, and as unnecessary because the subject of *costs* in such cases is dealt with by the general rule (revised subd. (f)(3)) that all proceedings occurring after a grant of a request are governed by the relevant rules on review and decision in the Supreme Court, including therefore revised rule 29.7 (costs and sanctions in the Supreme Court).~~

~~Former rule 29.5(h)(3) purported to give the Supreme Court discretion to "assign a certified question . . . priority on its docket." Revised rule 29.8(f) deletes this authorization as unnecessary: the Supreme Court does not need the permission of a rule to determine and redetermine the order of cases on its calendar.~~

~~Former rule 29.5(i) directed the Supreme Court clerk to notify the Attorney General if the question to be answered concerned the "interpretation of a California statute." Revised rule 29.8(f)(4) refocuses the problem more precisely. On the one hand, the revised provision is broader in that it also includes an interpretation of the California Constitution and a decision on the validity of any California law, including a regulation or an ordinance. On the other hand, the revised provision is narrower in that it limits the latter to laws "affecting the public interest"; it may be assumed the Attorney General is not concerned with laws that do not affect that interest. The former rule also provided that the Supreme Court "may permit" the Attorney General "to file briefs on the issue." The revised rule deletes this provision as unecessary: the Attorney General has the right to file amicus curiae briefs without permission under revised rule 29.1(f)(7).~~

~~Although no remittitur issues when a Supreme Court decision under this rule is final, it is the practice of the Supreme Court clerk to give notice of that finality to the requesting court and the parties. Revised 29.8(f)(6) fills a gap by providing for such notice; it is not a substantive change.~~

~~**Former subdivision (*l*).** Revised rule 29.8 deletes as superfluous former rule 29.5(*l*), which authorized the Supreme Court or the Judicial Council to adopt procedures implementing this rule. Those bodies have general authority to adopt such procedures.~~

Rule <u>8.352.</u> ~~29.9.~~ Transfer for decision

(a) Time of transfer

On a party's petition or its own motion, the Supreme Court may transfer to itself, for decision, a cause pending in a Court of Appeal.

(b) When a cause is pending

For purposes of this rule, a cause within the appellate jurisdiction of the superior court is not pending in the Court of Appeal until that court orders it transferred under rule ~~62~~ 8.752. Any cause pending in the Court of Appeal remains pending until the decision of the Court of Appeal is final in that court under rule ~~24~~ 8.264.

(c) Grounds

The Supreme Court will not order transfer under this rule unless the cause presents an issue of great public importance that the Supreme Court must promptly resolve.

(d) Petition and answer

A party seeking transfer under this rule must promptly serve and file in the Supreme Court a petition explaining how the cause satisfies the requirements of (c). Within 20 days after the petition is filed, any party may serve and file an answer. The petition and any answer must conform to the relevant provisions of rule ~~28.1~~ 8.304.

(e) Order

Transfer under this rule requires a Supreme Court order signed by at least four justices; an order denying transfer may be signed by the Chief Justice alone.

Advisory Committee Comment

Rule 8.352 applies only to causes that the Supreme Court transfers to itself for the purpose of reaching a decision on the merits. The rule implements a portion of article VI, section 12(a) of the Constitution. As used in article VI, section 12(a) and the rule, the term "cause" is broadly construed to include " 'all cases, matters, and proceedings of every description' " adjudicated by the Courts of Appeal and the Supreme Court. (*In re Rose* (2000) 22 Cal.4th 430, 540, quoting *In re Wells* (1917) 174 Cal. 467, 471.)

Advisory Committee Comment ~~(2003)~~ [version showing revisions]

~~Revised rule 29.9 is former rule 27.5. Like the former rule, it~~Rule 8.352 applies only to causes that the Supreme Court transfers to itself for the purpose of reaching a decision on the merits. ~~Also like the former rule, t~~The ~~revised~~ rule implements a portion of article VI, section 12(a) of the Constitution. As used in article VI, section 12(a) and the rule, the term "cause" is broadly construed to include " 'all cases, matters, and proceedings of every description' " adjudicated by the Courts of Appeal and the Supreme Court. (*In re Rose* (2000) 22 Cal.4th 430, 540, quoting *In re Wells* (1917) 174 Cal. 467, 471.)

~~**Subdivision (c).** Former rule 27.5(b) provided that the grounds for transferring a case to the Supreme Court from a Court of Appeal before decision in that court were a showing of "[1] issues of imperative public importance [2] requiring prompt resolution by the Supreme Court, and [3] justifying a departure from normal appellate processes." Revised rule 29.9(c) makes two nonsubstantive changes in that wording.~~

~~First, revised subdivision (c) substitutes "great" for "imperative." The idea to be conveyed is the degree of public importance; the word "imperative" describes a conclusion rather than a relative magnitude.~~

~~Second, revised subdivision (c) deletes the phrase, "justifying a departure from normal appellate processes." That, too, is primarily a conclusion. The true test is stated in the first two grounds of the former rule: in the rare instances in which the Supreme Court exercises its discretion to transfer a case to itself from a Court of Appeal before decision in that court, it does so only when the issue presented (1) is of great public importance and (2) must be resolved promptly and definitively, i.e., by the state's highest court. If these two grounds are shown, the Supreme Court may conclude that the case "justif[ies] a departure from normal appellate processes." The quoted language is not a separate ground for transfer but simply the conclusion that the court may draw from proof of the first two grounds stated in the rule.~~

~~**Subdivision (d).** Former rule 27.5(c) required a party seeking transfer to serve and file a petition "setting forth the nature of the cause, the issues presented and how they arose, and why those issues warrant a transfer of the cause." Revised rule 29.9(d) simply provides instead that the petition must explain how the cause satisfies the requirements of revised subdivision (c). This is a nonsubstantive change intended to make the requirement consistent with the revised rule's statement of the grounds for transfer and to focus the party's attention on those grounds.~~

~~**Former rule 29.9.** Former rule 29.9, a transitional provision, is repealed, having served its purpose.~~

Chapter 3. Criminal Appeals

Article 1. Taking the Appeal

Rule 8.400. ~~76.5.~~ Appointment of appellate counsel by the Court of Appeal

(a) Procedures

(1) Each Court of Appeal must adopt procedures for appointing appellate counsel for indigents not represented by the State Public Defender in all cases in which indigents are entitled to appointed counsel.

(2) The procedures must require each attorney seeking appointment to complete a questionnaire showing the attorney's California State Bar number, date of admission, qualifications, and experience.

(b) List of qualified attorneys

(1) The Court of Appeal must evaluate the attorney's qualifications for appointment and, if the attorney is qualified, place the attorney's name on a list to receive appointments in appropriate cases.

(2) The court must divide its appointments list into at least two levels based on the attorneys' experience and qualifications, using criteria approved by the Judicial Council or its designated oversight committee.

(c) Demands of the case

In matching counsel with the demands of the case, the Court of Appeal should consider:

(1) The length of the sentence;

(2) The complexity or novelty of the issues;

(3) The length of the trial and of the reporter's transcript; and

(4) Any questions concerning the competence of trial counsel.

(d) Evaluation

The court must review and evaluate the performance of each appointed counsel to determine whether counsel's name should remain on the list at the same level, be placed on a different level, or be deleted from the list.

(e) Contracts to perform administrative functions

(1) The court may contract with an administrator having substantial experience in handling appellate court appointments to perform any of the duties prescribed by this rule.

(2) The court must provide the administrator with the information needed to fulfill the administrator's duties.

Advisory Committee Comment [revised version]

Subdivision (b). The "designated oversight committee" referred to in subdivision (b)(2) is currently the Appellate Indigent Defense Oversight Advisory Committee.

Advisory Committee Comment [version showing revisions]

~~Revised rule 76.5 combines former rule 76.5 and former section 20(a)–(b) of the Standards of Judicial Administration. No substantive change is intended.~~

~~**Subdivision (a).** On its face, former rule 76.5 applicable only to appeals in criminal cases, but in practice the rule was also applied to appeals in certain juvenile, mental health, paternity, and other cases in which indigent appellants were entitled to appointed appellate counsel. Reflecting that practice, revised rule 76.5(a) declares that the rule applies "in all cases in which indigents are entitled to appointed counsel."~~

Subdivision (b). ~~Former rule 76.5(b) required the Court of Appeal to maintain "one or more lists" of attorneys qualified to receive appointments to represent indigent appellants. Consistently with practice, revised rule 76.5(b)(2) instead directs the court to maintain one list of such attorneys divided into at least two "levels" based on the attorneys' experience and qualifications.~~

~~Former rule 76.5(b) required the Court of Appeal, in establishing the lists of qualified attorneys, to "consider the guidelines in section 20 of the Standards of Judicial Administration." Subdivision (b) of section 20 classified qualified attorneys into three lists, but those classifications have become obsolete in practice. To facilitate ongoing management of the court-appointed counsel program, revised rule 76.5(b)(2) instead requires the Court of Appeal to use "criteria approved by the Judicial Council or its designated oversight committee."~~ The "designated oversight committee" <u>referred to in subdivision (b)(2)</u> is currently the Appellate Indigent Defense Oversight Advisory Committee.

~~The second paragraph of former section 20(a) of the Standards of Judicial Administration prescribed four "factors" to be considered by the Court of Appeal in matching counsel with the demands of the case under rule 76.5. To promote efficiency, those factors have been moved from section 20 into rule 76.5 itself (subd. (c)).~~

~~**Subdivision (d).** Former rule 76.5(c) required the Court of Appeal to evaluate the performance of each appointed counsel to determine whether counsel's name should remain "on the same appointment list, be placed on a different list," or be deleted. Consistently with the usage adopted in revised rule 76.5(b), discussed above, revised rule 76.5(d) instead directs the Court of Appeal to determine whether counsel's name should remain "at the same level, be placed on a different level," or be deleted.~~

~~**Subdivision (e).** The final sentence of former rule 76.5(d) provided that "if the administrator is to perform the review and evaluation functions specified in subdivision (c), the court shall notify the administrator of any superior or substandard performance by appointed counsel." In a nonsubstantive change intended to make the rule consistent with the practice of the Courts of Appeal, revised rule 76.5(e)(2) deletes the quoted directive. The requirement of revised rule 76.5(e)(1) that the court "must provide the administrator with the information needed to fulfill the administrator's duties" ensures that the courts will, when necessary or advisable, communicate with the district appellate projects concerning the quality of appointed counsel's performance.~~

Rule <u>8.404.</u> ~~30. Taking the appeal~~ <u>Filing the appeal; certificate of probable cause</u>

(a) Notice of appeal

(1) To appeal from a judgment or an appealable order of the superior court in a felony case—other than a judgment imposing a sentence of death—the defendant or the People must file a notice of appeal in that superior court. To

appeal after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must also comply with (b).

(2) As used in (1), "felony case" means any criminal action in which a felony is charged, regardless of the outcome. It includes an action in which the defendant is charged with:

(A) A felony and a misdemeanor or infraction, but is convicted of only the misdemeanor or infraction;

(B) A felony, but is convicted of only a lesser offense; or

(C) An offense filed as a felony but punishable as either a felony or a misdemeanor, and the offense is thereafter deemed a misdemeanor under Penal Code section 17(b).

(3) If the defendant appeals, the defendant or the defendant's attorney must sign the notice of appeal. If the People appeal, the attorney for the People must sign the notice.

(4) The notice of appeal must be liberally construed. Except as provided in (b), the notice is sufficient if it identifies the particular judgment or order being appealed. The notice need not specify the court to which the appeal is taken; the appeal will be treated as taken to the Court of Appeal for the district in which the superior court is located.

(b) Appeal after plea of guilty or nolo contendere or after admission of probation violation

(1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court—in addition to the notice of appeal required by (a)—the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause.

(2) Within 20 days after the defendant files a statement under (1), the superior court must sign and file either a certificate of probable cause or an order denying the certificate.

(3) If the defendant does not file the statement required by (1) or if the superior court denies a certificate of probable cause, the superior court clerk must mark the notice of appeal "Inoperative," notify the defendant, and send a copy of the marked notice of appeal to the district appellate project.

(4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on:

(A) The denial of a motion to suppress evidence under Penal Code section 1538.5, or

(B) Grounds that arose after entry of the plea and do not affect the plea's validity.

(5) If the defendant's notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1).

(c) Notification of the appeal

(1) When a notice of appeal is filed, the superior court clerk must promptly mail a notification of the filing to the attorney of record for each party, to any unrepresented defendant, to the reviewing court clerk, to each court reporter, and to any primary reporter or reporting supervisor. If the defendant also files a statement under (b)(1), the clerk must not mail the notification unless the superior court files a certificate under (b)(2).

(2) The notification must show the date it was mailed, the number and title of the case, and the dates the notice of appeal and any certificate under (b)(2) were filed. If the information is available, the notification must also include:

(A) The name, address, telephone number, and California State Bar number of each attorney of record in the case;

(B) The name of the party each attorney represented in the superior court; and

(C) The name, address, and telephone number of any unrepresented defendant.

(3) The notification to the reviewing court clerk must also include a copy of the notice of appeal, any certificate filed under (b), and the sequential list of reporters made under rule ~~980.4~~ 2.950.

(4) A copy of the notice of appeal is sufficient notification under (1) if the required information is on the copy or is added by the superior court clerk.

(5) The mailing of a notification under (1) is a sufficient performance of the clerk's duty despite the discharge, disqualification, suspension, disbarment, or death of the attorney.

(6) Failure to comply with any provision of this subdivision does not affect the validity of the notice of appeal.

Advisory Committee Comment [revised version]

Subdivision (a). Penal Code section 1235(b) provides that an appeal from a judgment or appealable order in a "felony case" is taken to the Court of Appeal, and Penal Code section 691(f) defines "felony case" to mean "a criminal action in which a felony is charged . . . ." Rule 8.404(a)(2) makes it clear that a "felony case" is an action in which a felony is charged *regardless of the outcome of the action*. Thus the question whether to file a notice of appeal under this rule or under the rules governing appeals to the appellate division of the superior court (rule 8.800 et seq.) is answered simply by examining the accusatory pleading: if that document charged the defendant with at least one count of felony (as defined in Pen. Code, § 17(a)), the Court of Appeal has appellate jurisdiction and the appeal must be taken under this rule *even if the prosecution did not result in a punishment of imprisonment in a state prison*.

It is settled case law that an appeal is taken to the Court of Appeal not only when the defendant is charged with and convicted of a felony, but also when the defendant is charged with both a felony and a misdemeanor (Pen. Code, § 691(f)) but is convicted of only the misdemeanor (e.g., *People v. Brown* (1970) 10 Cal.App.3d 169); when the defendant is charged with a felony but is convicted of only a lesser offense (Pen. Code, § 1159; e.g., *People v. Spreckels* (1954) 125 Cal.App.2d 507); and when the defendant is charged with an offense filed as a felony but punishable as either a felony or a misdemeanor, and the offense is thereafter deemed a misdemeanor under Penal Code section 17(b) (e.g., *People v. Douglas* (1999) 20 Cal.4th 85; *People v. Clark* (1971) 17 Cal.App.3d 890).

Trial court unification did not change this rule: after as before unification, "Appeals in felony cases lie to the [C]ourt of [A]ppeal, regardless of whether the appeal is from the superior court, the municipal court, or the action of a magistrate. *Cf.* Cal. Const. art. VI, § 11(a) [except in death penalty cases, Courts of Appeal have appellate jurisdiction when superior courts have original jurisdiction 'in causes of a type within the appellate jurisdiction of the [C]ourts of [A]ppeal on June 30, 1995 . . . .']." ("Recommendation on Trial Court Unification" (July 1998) 28 *Cal. Law Revision Com. Rep.* 455–56.)

Subdivision (b). Under subdivision (b)(1), the defendant is required to file both a notice of appeal and the statement required by Penal Code section 1237.5(a) for issuance of a certificate of probable cause. Requiring a notice of appeal in all cases simplifies the rule, permits compliance with the signature requirement of rule 8.404(a)(3), ensures that the defendant's intent to appeal will not be misunderstood, and makes the provision consistent with the rule in civil appeals and with current practice as exemplified in the Judicial Council form governing criminal appeals.

Because of the drastic consequences of failure to file the statement required for issuance of a certificate of probable cause in an appeal after a plea of guilty or nolo contendere or after an admission of probation violation, subdivision (b)(5) alerts appellants to a relevant rule of case law, i.e., that although such an appeal may be maintained without a certificate of probable cause if the notice of appeal states the appeal is based on the denial of a motion to suppress evidence or on grounds arising after entry of the plea and not affecting its validity (rule 8.404(b)(4)), no *issue* challenging the validity of the plea is cognizable on that appeal without a certificate of probable cause. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1104.)

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

Subdivision (a). ~~Revised rule 30(a) collects related provisions of former rule 31(a) and (b) and implements certain provisions of the Penal Code.~~

Penal Code section 1235(b) provides that an appeal from a judgment or appealable order in a "felony case" is taken to the Court of Appeal, and Penal Code section 691(f)~~,~~ defines "felony case" to mean "a criminal action in which a felony is charged . . . ." ~~Revised r~~Rule ~~30~~ 8.404(a)(2) makes it clear that a "felony case" is an action in which a felony is charged *regardless of the outcome of the action*. Thus the question whether to file a notice of appeal under this rule or under the rules governing appeals to the appellate division of the superior court (rule ~~100~~ 8.800 et seq.) is answered simply by examining the accusatory pleading: if that document charged the defendant with at least one count of felony (as defined in Pen. Code, § 17(a)), the Court of Appeal has appellate jurisdiction and the appeal must be taken under this rule *even if the prosecution did not result in a punishment of imprisonment in a state prison*.

~~This is not a substantive change.~~ It is settled case law that an appeal is taken to the Court of Appeal not only when the defendant is charged with and convicted of a felony, but also when the defendant is charged with both a felony and a misdemeanor (Pen. Code, § 691(f)) but is convicted of only the misdemeanor (e.g., *People v. Brown* (1970) 10 Cal.App.3d 169); when the defendant is charged with a felony but is convicted of only a lesser offense (Pen. Code, § 1159; e.g., *People v. Spreckels* (1954) 125 Cal.App.2d 507); and when the defendant is charged with an offense filed as a felony but punishable as either a felony or a misdemeanor, and the offense is thereafter deemed a misdemeanor under Penal Code section 17(b) (e.g., *People v. Douglas* (1999) 20 Cal.4th 85; *People v. Clark* (1971) 17 Cal.App.3d 890).

Trial court unification did not change this rule: after as before unification, "Appeals in felony cases lie to the [C]ourt of [A]ppeal, regardless of whether the appeal is from the superior court, the municipal court, or the action of a magistrate. *Cf.* Cal. Const. art. VI, § 11(a) [except in death penalty cases, Courts of Appeal have appellate jurisdiction when superior courts have original jurisdiction 'in causes of a type within the appellate jurisdiction of the [C]ourts of [A]ppeal on June 30, 1995 . . . .']." ("Recommendation on Trial Court Unification" (July 1998) 28 *Cal. Law Revision Com. Rep.* 455–56.)

Subdivision (b). ~~Revised rule 30(b) is former rule 31(d), and governs appeals requiring a certificate of probable cause. Revised rule 30(b)(1) restates the first sentence of former rule 31(d), first paragraph, with two substantive changes. First, the revised subdivision fills a gap by extending the rule to appeals after an admission of probation violation, as provided by statute. (Pen. Code, § 1237.5.)~~

~~Second, under the former rule the statement required by Penal Code section 1237.5(a) for issuance of a certificate of probable cause served as a *substitute* for a notice of appeal; under revised rule 30(b)(1), however,~~ Under subdivision (b)(1), the defendant is required to file both a notice of appeal ~~*and*~~and ~~that~~the statement required by Penal Code section 1237.5(a) for issuance of a certificate of probable cause. Requiring a notice of appeal in all cases simplifies the rule, permits compliance with the signature requirement of ~~revised rule 30(a)(2)~~ rule 8.404(a)(3), ensures that the defendant's intent to appeal will not be misunderstood, and makes the provision consistent with the rule in civil appeals and with current practice as exemplified in the Judicial Council form governing criminal appeals. ~~The change is substantive.~~

~~Revised rule 30(b)(3) fills a gap in the procedure for processing appeals after a plea of guilty or nolo contendere or after an admission of probation violation. In such "certificate" appeals, if the defendant~~

~~does not file the statement required for issuance of a certificate of probable cause or if the superior court denies such a certificate, revised rule 30(b)(3) requires the clerk to mark the notice of appeal "Inoperative" and notify the appellant. Former rule 30(a) (now revised rule 30.1(d)) similarly required the clerk to mark the notice of appeal and notify the appellant if the notice was filed *late*; revised rule 30(b)(3) thus recognizes an additional ground on which the notice of appeal fails to achieve the appellant's intent. Revised rule 30(b)(3) also requires the clerk to send a copy of the notice of appeal, thus marked, to the appellate project for the district; that entity is charged with the duty, among others, of dealing with indigent criminal appeals that suffer from procedural defect, but it can do so efficiently only if it is promptly notified of such cases. The change is substantive.~~

Because of the drastic consequences of failure to file the statement required for issuance of a certificate of probable cause in an appeal after a plea of guilty or nolo contendere or after an admission of probation violation, ~~revised rule 30~~ subdivision (b)(5) alerts appellants to a relevant rule of case law, i.e., that although such an appeal may be maintained without a certificate of probable cause if the notice of appeal states the appeal is based on the denial of a motion to suppress evidence or on grounds arising after entry of the plea and not affecting its validity (rule ~~30~~ 8.404(b)(4)), no *issue* challenging the validity of the plea is cognizable on that appeal without a certificate of probable cause. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1104.)

~~**Subdivision (c).** Revised rule 30(c) collects related provisions of former rule 31(a) and (c).~~

~~The third paragraph of former rule 31(a) directed each attorney filing a notice of appeal on a defendant's behalf – or assisting a defendant in filing a notice of appeal – to serve a copy of the notice on "the court reporter, lead reporter, or reporting supervisor." In a substantive change, the first sentence of revised rule 30(c)(1) places this duty instead on the superior court clerk, who is best situated to know the identities of the reporters and who is charged in any event with sending a notification of the filing of the notice of appeal to the reviewing court (together with a copy of the sequential list of reporters under rule 980.4) and to the attorneys for the parties.~~

~~The second sentence of revised rule 30(c)(1) is new: it is intended to promote economy by requiring the clerk to defer mailing a notification of the filing of a "certificate" appeal to the parties, the reviewing court, and particularly the reporter, until it is certain the appeal will in fact be allowed to proceed. The change is substantive.~~

~~Because a "certificate" appeal is not operative unless and until the superior court files a certificate of probable cause, revised rule 30(c)(2) requires the superior court clerk to include the date of that filing in the notification of the appeal, and revised rule 30(c)(3) requires the clerk to include a copy of the certificate itself in the notification mailed to the reviewing court clerk. Both are substantive changes.~~

~~Each provision of revised rule 30(c)(2)(A)–(C), (4), and (5) fills a gap and incorporates wording of revised rule 1(d)(2)(A)–(C), (3), and (4), respectively.~~

Rule 8.412. ~~30.2.~~ Stay of execution and release on appeal

(a) Application

Pending appeal, the defendant may apply to the reviewing court:

(1) For a stay of execution after a judgment of conviction or an order granting probation; or

(2) For bail, to reduce bail, or for release on other conditions.

(b) Showing

The application must include a showing that the defendant sought relief in the superior court and that the court unjustifiably denied the application.

(c) Service

The application must be served on the district attorney and on the Attorney General.

(d) Interim relief

Pending its ruling on the application, the reviewing court may grant the relief requested. The reviewing court must notify the superior court under rule ~~56~~ 8.700(j) of any stay that it grants.

Advisory Committee Comment [revised version]

Subdivision (a). The remedy of an application for bail under subdivision (a)(2) is separate from but consistent with the statutory remedy of a petition for habeas corpus under Penal Code section 1490. (*In re Brumback* (1956) 46 Cal.2d 810, 815, fn. 3.)

An order of the Court of Appeal denying bail or reduction of bail, or for release on other conditions, is final on filing. (See rule 8.264(b)(2)(C).)

Subdivision (d). The first sentence of subdivision (d) recognizes the case law holding that a reviewing court may grant bail or reduce bail, or release the defendant on other conditions, pending its ruling on an application for that relief. (See, e.g., *In re Fishman* (1952) 109 Cal.App.2d 632, 633; *In re Keddy* (1951) 105 Cal.App.2d 215, 217.) The second sentence of the subdivision requires the reviewing court to notify the superior court under rule 8.700(j) when it grants either (i) a stay to preserve the status quo pending its ruling on a stay application or (ii) the stay requested by that application.

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

~~Revised rule 30.2 is former rule 32.~~

Subdivision (a). ~~Revised rule 30.2(a)(1) fills a gap by recognizing that a reviewing court may stay execution of an order granting probation pending appeal. (See Pen. Code, § 1243.)~~

The remedy of an application for bail under ~~revised rule 30.2~~subdivision (a)(2) is separate from but consistent with the statutory remedy of a petition for habeas corpus under Penal Code section 1490. (*In re Brumback* (1956) 46 Cal.2d 810, 815, fn. 3.)

An order of the Court of Appeal denying bail or reduction of bail, or for release on other conditions, is final on filing. (See rule ~~24~~ 8.264(b)(2)(C).)

~~**Subdivision (c).** Revised rule 30.2(c) fills a gap by requiring service of an application for stay of execution on the district attorney and the Attorney General.~~

Subdivision (d). The first sentence of ~~revised rule 30.2~~subdivision (d) recognizes the case law holding that a reviewing court may grant bail or reduce bail, or release the defendant on other conditions, pending its ruling on an application for that relief. (See, e.g., *In re Fishman* (1952) 109 Cal.App.2d 632, 633; *In re Keddy* (1951) 105 Cal.App.2d 215, 217.) The second sentence of the ~~revised~~ subdivision ~~resolves an ambiguity in the former rule by requiring~~requires the reviewing court to notify the superior court under rule ~~56(h)~~ 8.700(j) when it grants either (i) a stay to preserve the status quo pending its ruling on a stay application or (ii) the stay requested by that application.

Rule 8.416. ~~30.3.~~ Abandoning the appeal

(a) How to abandon

An appellant may abandon the appeal at any time by filing an abandonment of the appeal signed by the appellant or the appellant's attorney of record.

(b) Where to file; effect of filing

(1) If the record has not been filed in the reviewing court, the appellant must file the abandonment in the superior court. The filing effects a dismissal of the appeal and restores the superior court's jurisdiction.

(2) If the record has been filed in the reviewing court, the appellant must file the abandonment in that court. The reviewing court may dismiss the appeal and direct immediate issuance of the remittitur.

(c) Clerk's duties

(1) The clerk of the court in which the appellant files the abandonment must immediately notify the adverse party of the filing or of the order of dismissal. If the defendant abandons the appeal, the clerk must notify both the district attorney and the Attorney General.

(2) If the appellant files the abandonment in the superior court, the clerk must immediately notify the reviewing court.

(3) The clerk must immediately notify the reporter if the appeal is abandoned before the reporter has filed the transcript.

~~**Advisory Committee Comment (2004)**~~

~~Revised rule 30.3 is former rule 38.~~

~~**Subdivision (a).** The former rule provided that an appellant may *dismiss* an appeal by filing an *abandonment* of it; revised rule 30.3(a) provides instead that an appellant may *abandon* an appeal by filing such an abandonment. The change is not substantive, and is intended to simplify the rule and to clarify its operation by reserving the term "dismiss" for the discretionary act of a reviewing court in response to an abandonment filed in that court (see revised subd. (b)(2)).~~

~~**Subdivision (c).** Paragraphs (2) and (3) of revised rule 30.3(c) fill gaps in the former rule and are substantive changes.~~

Article 2. Record on Appeal

Rule 8.420. ~~31.~~ Normal record; exhibits

(a) Contents

If the defendant appeals from a judgment of conviction, or if the People appeal from an order granting a new trial, the record must contain a clerk's transcript and a reporter's transcript, which together constitute the normal record.

(b) Clerk's transcript

The clerk's transcript must contain:

(1) The accusatory pleading and any amendment;

(2) Any demurrer or other plea;

(3) All court minutes;

(4) All instructions submitted in writing, each one indicating the party requesting it;

(5) Any written communication between the court and the jury or any individual juror;

(6) Any verdict;

(7) Any written opinion of the court;

(8) The judgment or order appealed from and any abstract of judgment or commitment;

(9) Any motion for new trial, with supporting and opposing memoranda and attachments;

(10) The notice of appeal and any certificate of probable cause filed under rule ~~30~~ 8.404(b);

(11) Any transcript of a sound or sound-and-video recording furnished to the jury or tendered to the court under rule ~~243.9~~ 2.1040;

(12) Any application for additional record and any order on the application;

(13) And, if the appellant is the defendant~~, the clerk's transcript must also contain~~:

(A) Any written defense motion denied in whole or in part, with supporting and opposing memoranda and attachments;

(B) If related to a motion under (A), any search warrant and return and the reporter's transcript of any preliminary examination or grand jury hearing;

(C) Any certified record of a court or the Department of Corrections admitted in evidence to prove a prior conviction or prison term; and

(D) The probation officer's report.

(c) Reporter's transcript

The reporter's transcript must contain:

(1) The oral proceedings on the entry of any plea other than a not guilty plea;

(2) The oral proceedings on any motion in limine;

(3) The oral proceedings at trial, but excluding the voir dire examination of jurors and any opening statement;

(4) All instructions given orally;

(5) Any oral communication between the court and the jury or any individual juror;

(6) Any oral opinion of the court;

(7) The oral proceedings on any motion for new trial;

(8) The oral proceedings at sentencing, granting or denial of probation, or other dispositional hearing;

(9) And, if the appellant is the defendant~~, the reporter's transcript must also contain~~:

(A) The oral proceedings on any motion under Penal Code section 1538.5 denied in whole or in part;

(B) The closing arguments; and

(C) Any comment on the evidence by the court to the jury.

(d) Limited normal record in certain appeals

If the People appeal from a judgment on a demurrer to the accusatory pleading, or if the defendant or the People appeal from an appealable order other than a ruling on a motion for new trial, the normal record is composed of a reporter's transcript of any oral proceedings incident to the judgment or order being appealed and a clerk's transcript containing:

(1) The accusatory pleading and any amendment;

(2) Any demurrer or other plea;

(3) Any motion or notice of motion granted or denied by the order appealed from, with supporting and opposing memoranda and attachments;

(4) The judgment or order appealed from and any abstract of judgment or commitment;

(5) Any court minutes relating to the judgment or order appealed from; and

(6) The notice of appeal.

(e) Exhibits

Exhibits admitted in evidence, refused, or lodged are deemed part of the record, but may be transmitted to the reviewing court only as provided in rule ~~18~~ 8.224.

(f) Stipulation for partial transcript

If counsel for the defendant and the People stipulate in writing before the record is certified that any part of the record is not required for proper determination of the appeal, that part must not be prepared or sent to the reviewing court.

(g) Form of record

The clerk's and reporter's transcripts must comply with rule ~~9~~ 8.144.

~~**Advisory Committee Comment (2004)**~~

~~Revised rule 31 combines former rules 33(a), 34, and 35(f).~~

~~**Subdivision (c).** Former rule 33(a)(2) provided that oral communications between the court and the jury after the giving of the instructions were included in the normal reporter's transcript only in an appeal by the defendant; revised rule 31(c)(5) extends that provision generally to an appeal by either party. Written communications between the court and the jury are included in the normal clerk's transcript in an appeal by either party (see revised subd. (b)(5)), and no reason appears to perpetuate the distinction.~~

~~**Subdivision (d).** Revised rule 31(d) is former rule 34.~~

~~**Subdivision (e).** Revised rule 31(e) supersedes scattered and incomplete provisions on exhibits previously found in former rules 33(a)(3), 33(b)(3), 34(3), and 35(e). The revised rule incorporates by reference rule 18, which contains substantive changes that are explained in the comment to that rule.~~

~~**Subdivision (f).** Revised rule 31(f) is former rule 35(f).~~

Rule 8.424. ~~31.1.~~ Application in superior court for addition to normal record

(a) Appeal by the People

The People, as appellant, may apply to the superior court for inclusion in the record of any item that would be part of the normal record in a defendant's appeal.

(b) Application by either party

Either the People or the defendant may apply to the superior court for inclusion in the record of any of the following items:

(1) In the clerk's transcript: any defense motion granted in whole or in part or any motion by the People, with supporting and opposing memoranda and attachments;

(2) In the reporter's transcript:

(A) The voir dire examination of jurors;

(B) Any opening statement; and

(C) The oral proceedings on motions other than those listed in rule ~~31~~ 8.420(c).

(c) Application

(1) An application for additional record must describe the material to be included and explain how it may be useful in the appeal.

(2) The application must be filed in the superior court with the notice of appeal or as soon thereafter as possible, and will be treated as denied if it is filed after the record is sent to the reviewing court.

(3) The clerk must immediately present the application to the trial judge.

(d) Order

(1) Within five days after the application is filed, the judge must order that the record include as much of the additional material as the judge finds proper to fully present the points raised by the applicant. Denial of the application does not preclude a motion in the reviewing court for augmentation under rule ~~12~~ 8.155.

(2) If the judge does not rule on the application within the time prescribed by (1), the requested material—other than exhibits—must be included in the clerk's transcript or the reporter's transcript without a court order.

(3) The clerk must immediately notify the reporter if additions to the reporter's transcript are required under (1) or (2).

~~**Advisory Committee Comment (2004)**~~

~~Revised rule 31.1 is former rule 33(b).~~

~~**Subdivision (b).** Former rule 33(b) described the application for additional record as both an "application" and a "request" for an order. For internal consistency and consistency with the style of these rules, revised rule 31.1 uses only the term "application." The change is not substantive.~~

~~Former rule 33(b)(3) provided for the transmission to the reviewing court of exhibits not requested by that court. Revised rule 31(e) now governs the transmission of exhibits.~~

~~**Subdivisions (c) and (d).** Former rule 33(b) required the clerk, when a request for additional record was filed, to *immediately* present it to the judge "and notify the reporter." But because the reporter had no duty to prepare any additional transcript unless the judge granted the request or failed to act on it within five days, the notification was premature. In a substantive change, subdivision (c)(3) of revised rule 31.1 deletes the requirement of immediate notification, and subdivision (d)(3) instead directs the clerk to notify the reporter when and if additions to the transcript are needed.~~

Rule <u>8.428.</u> ~~31.2.~~ Sealed records

(a) *Marsden* hearing

(1) The reporter's transcript of any hearing held under *People v. Marsden* (1970) 2 Cal.3d 118 must be sealed. The chronological index to the reporter's transcript must include the *Marsden* hearing but list it as "SEALED" or the equivalent.

(2) The superior court clerk must send the original and one copy of the sealed transcript to the reviewing court with the record.

(3) The superior court clerk must send one copy of the sealed transcript to the defendant's appellate counsel or, if appellate counsel has not yet been retained or appointed, to the appellate project for the district.

(4) If the defendant raises a *Marsden* issue in the opening brief, the reviewing court clerk must send a copy of the sealed transcript to the People on written application, unless the defendant has served and filed with the brief a notice that the transcript contains confidential material not relevant to the issues on appeal.

(5) If the defendant serves and files a notice under (4), the People may move to obtain a copy of any relevant portion of the sealed transcript.

(b) Other in-camera proceedings

(1) Any party may apply to the superior court for an order that the record include:

(A) <u>A</u> sealed, separately paginated reporter's transcript of any in-camera proceeding at which a party was not allowed to be represented; and

(B) Any item that the trial court withheld from a party on the ground that it was confidential.

(2) The application and any ruling under (1) must comply with rule ~~31.1~~ 8.424.

(3) If the court grants the application, it may order the reporter who attended the in-camera proceeding to personally prepare the transcript. The chronological index to the reporter's transcript must include the proceeding but list it as "SEALED" or the equivalent.

(4) The superior court clerk must send the transcript of the in-camera proceeding or the confidential item to the reviewing court in a sealed envelope labeled "CONFIDENTIAL—MAY NOT BE EXAMINED WITHOUT COURT ORDER." The reviewing court clerk must file the envelope and store it separately from the remainder of the record.

(5) The superior court clerk must prepare an index of any material sent to the reviewing court under (4), except material relating to a request for funds under Penal Code section 987.9(a), showing the date and the names of all parties present at each proceeding, but not disclosing the substance of the sealed matter, and send the index:

(A) To the People, and

(B) To the defendant's appellate counsel or, if appellate counsel has not yet been retained or appointed, to the appellate project for the district.

(6) Unless the reviewing court orders otherwise, material sealed under (4) may be examined only by a reviewing court justice personally; but parties and their attorneys who had access to the material in the trial court may also examine it.

(c) Omissions

If at any time the superior court clerk or the reporter learns that the record omits material that any rule requires included and that this rule requires sealed:

(1) The clerk and the reporter must comply with rule ~~32.1~~ 8.440(b), and

(2) The clerk must comply with the provisions of this rule requiring sealing and prescribing which party's counsel, if any, must receive a copy of sealed material.

Advisory Committee Comment [revised version]

Subdivision (b). Subdivision (b)(5) requires the clerk to prepare and send to the parties an index of any confidential materials sent to the reviewing court, showing the date and the names of all parties present. The purpose of this provision is to assist the parties in making—and the court in adjudicating—motions to unseal portions of the record. To protect confidentiality until a record is unsealed, however, the index must endeavor to identify the sealed matter without disclosing its substance.

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

~~Revised rule 31.2 is former rule 33.5.~~

~~**Subdivision (a).** Former rule 33.5(a) required the superior court clerk to send the defendant's copy of a sealed *Marsden* transcript to the reviewing court and required the reviewing court clerk to forward that copy to the defendant's appellate counsel; the latter act was not discretionary. In a substantive change intended to simplify the process and promote efficiency, revised rule 31.2(a)(3) requires the superior court clerk to send the defendant's copy directly to the defendant's appellate counsel.~~

~~Former rule 33.5(a) also required the reviewing court clerk, in cases in which the defendant's appellate counsel had not been retained or appointed when the *Marsden* transcript reached the reviewing court, to retain custody of the transcript and send it to such counsel only "when he or she has appeared in the cause." But because most criminal defendants request appointment of appellate counsel and the appellate projects are charged with recommending those appointments to the reviewing courts, it is the practice of reviewing court clerks to send *Marsden* transcripts directly to the appellate projects on receiving them, rather than retaining them until counsel are appointed. Revised rule 31.2(a)(3)(B) incorporates this practice; the change is substantive.~~

Subdivision (b). ~~Former rule 33.5(b) authorized a party to seek an order adding confidential materials to the record by means of a "request" to the court. For consistency with the style of these rules, revised rule 31.2(b) substitutes the term "application." The change is not substantive.~~

~~Former rule 33.5(b)(2) authorized adding confidential "written materials" to the record; filling a gap, revised rule 31.2(b)(1)(B) substitutes the broader phrase "any item" in order to include such nonwritten materials as photographic exhibits.~~

~~Revised rule 31.2(b)(5) fills a gap by requiring~~Subdivision (b)(5) requires the clerk to prepare and send to the parties an index of any confidential materials sent to the reviewing court, showing the date and the names of all parties present. The purpose of this ~~substantive change~~provision is to assist the parties in making—and the court in adjudicating—motions to unseal portions of the record. To protect confidentiality until a record is unsealed, however, the index must endeavor to identify the sealed matter without disclosing its substance.

Rule 8.432. ~~31.3.~~ Juror-identifying information

(a) Applicability

A clerk's transcript, a reporter's transcript, or any other document in the record that contains juror-identifying information must comply with this rule.

(b) Juror names, addresses, and telephone numbers

(1) The name of each trial juror or alternate sworn to hear the case must be replaced with an identifying number wherever it appears in any document. The superior court clerk must prepare and keep under seal in the case file a table correlating the jurors' names with their identifying numbers. The clerk and the reporter must use the table in preparing all transcripts or other documents.

(2) The addresses and telephone numbers of trial jurors and alternates sworn to hear the case must be deleted from all documents.

(c) Potential jurors

Information identifying potential jurors called but not sworn as trial jurors or alternates must not be sealed unless otherwise ordered under Code of Civil Procedure section 237(a)(1).

Advisory Committee Comment [revised version]

Rule 8.432 implements Code of Civil Procedure section 237.

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

~~Revised rule 31.3 is former rule 33.6. The r~~Rule 8.432 implements Code of Civil Procedure section 237.

Rule 8.436. ~~32.~~ Preparing, certifying, and sending the record

(a) Immediate preparation when appeal is likely

(1) The reporter and the clerk must begin preparing the record immediately after a verdict or finding of guilt of a felony is announced following a trial on the merits, unless the judge determines that an appeal is unlikely under (2).

(2) In determining the likelihood of an appeal, the judge must consider the facts of the case and the fact that an appeal is likely if the defendant has been convicted of a crime for which probation is prohibited or is prohibited except in unusual cases, or if the trial involved a contested question of law important to the outcome.

(3) A determination under (2) is an administrative decision intended to further the efficient operation of the court and not intended to affect any substantive or

procedural right of the defendant or the People. The determination cannot be cited to prove or disprove any legal or factual issue in the case and is not reviewable by appeal or writ.

(b) Appeal after plea of guilty or nolo contendere or after admission of probation violation

In an appeal under rule ~~30~~ 8.404(b)(1), the time to prepare, certify, and file the record begins when the court files a certificate of probable cause under rule ~~30~~ 8.404(b)(2).

(c) Clerk's transcript

(1) Except as provided in (a) or (b), the clerk must begin preparing the clerk's transcript immediately after the notice of appeal is filed.

(2) Within 20 days after the notice of appeal is filed, the clerk must complete preparation of an original and two copies of the clerk's transcript.

(3) On request, the clerk must prepare an extra copy for the district attorney.

(4) If there is more than one appealing defendant, the clerk must prepare an extra copy for each additional appealing defendant represented by separate counsel.

(5) The clerk must certify as correct the original and all copies of the clerk's transcript.

(d) Reporter's transcript

(1) Except as provided in (a) or (b), the reporter must begin preparing the reporter's transcript immediately on being notified by the clerk under rule ~~30~~ 8.404(c)(1) that the notice of appeal has been filed.

(2) The reporter must prepare an original and the same number of copies of the reporter's transcript as (c) requires of the clerk's transcript, and must certify each as correct.

(3) The reporter must deliver the original and all copies to the superior court clerk as soon as they are certified, but no later than 20 days after the notice of appeal is filed.

(4) Any portion of the transcript transcribed during trial must not be retyped unless necessary to correct errors, but must be repaginated and bound with any

portion of the transcript not previously transcribed. Any additional copies needed must not be retyped but must be prepared by photocopying or an equivalent process.

(5) In a multireporter case, the clerk must accept any completed portion of the transcript from the primary reporter one week after the time prescribed by (3) even if other portions are uncompleted. The clerk must promptly pay each reporter who certifies that all portions of the transcript assigned to that reporter are completed.

(e) Extension of time

(1) The superior court may not extend the time for preparing the record.

(2) The reviewing court may order one or more extensions of time for preparing the record, not exceeding a total of 60 days, on receipt of:

(A) An affidavit showing good cause, and

(B) In the case of a reporter's transcript, certification by the superior court presiding judge, or a court administrator designated by the presiding judge, that an extension is reasonable and necessary in light of the workload of all reporters in the court.

(f) Sending the transcripts

(1) When the clerk and reporter's transcripts are certified as correct, the clerk must promptly send:

(A) The original transcripts to the reviewing court, noting the sending date on each original;

(B) One copy of each transcript to each defendant's appellate counsel and to the Attorney General; and

(C) One copy of each transcript to the district attorney if requested under (c)(3).

(2) If the defendant's appellate counsel has not been retained or appointed when the transcripts are certified as correct, the clerk must send that counsel's copy of the transcripts to the district appellate project.

(g) Probation officer's report

The probation officer's report included in the clerk's transcript under rule ~~31~~ 8.420(b) must appear in all copies of the appellate record. The reviewing court's copy of the report must be placed in a sealed envelope marked "CONFIDENTIAL—MAY NOT BE EXAMINED WITHOUT COURT ORDER—PROBATION OFFICER REPORT."

(h) Supervision of preparation of record

Each Court of Appeal clerk, under the supervision of the administrative presiding justice or the presiding justice, must take all appropriate steps to ensure that superior court clerks and reporters promptly perform their duties under this rule. This provision does not affect the superior courts' responsibility for the prompt preparation of appellate records.

Advisory Committee Comment [revised version]

Subdivision (a). Subdivision (a) implements Code of Civil Procedure section 269(b).

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

Subdivision (a). ~~Revised rule 32(a) is former rule 34.5, implementing~~Subdivision (a) implements Code of Civil Procedure section 269(b).~~ Like the former rule, revised rule 32(a)(2) provides brief guidelines to assist the trial judge in deciding whether an appeal in the case is likely or unlikely. The former rule set forth three additional guidelines for the same purpose; but because two of these are plainly implied by the remainder of the rule and the third is not actually a guideline but a statistic, all three are deleted from revised rule 32(a).~~

~~**Subdivision (b).** Revised rule 32(b) restates the third paragraph of former rule 31(d).~~

~~**Subdivision (c).** Revised rule 32(c) is derived from former rule 35(a). Former rule 35(a) generally provided that extensions of time to prepare the clerk's transcript were governed by rule 45(c), but former rule 35(d) specifically provided a different procedure for extending any record-preparation time prescribed by the rule. The revised rule removes this inconsistency by providing that extensions of time to prepare the clerk's transcript, like extensions for the reporter's transcript, are governed by subdivision (e).~~

~~In a case with more than one appealing defendant, the former rule directed the clerk to prepare an extra copy of the clerk's transcript for each extra defendant; but the rule limited the number of those copies to two regardless of the number of additional defendants, unless one or more of the defendants was sentenced to death. The revised rule deletes that limit in order to conform to current practice, in which a copy of the transcript is typically prepared for each additional appealing defendant represented by separate counsel.~~

~~**Subdivision (d).** Revised rule 32(d) is primarily derived from former rule 35(b). The revised rule deletes the provision of the former rule that required the clerk to deliver the notification of the filing of the notice of appeal to the reporter "personally or to his or her office or internal mail receptacle" and authorized the~~

~~clerk to mail the notification if the reporter was not a court employee; the provision was unnecessary micromanagement of the clerk's office. (For the same reason, revised rule 4 deletes the same provision from the civil appellate rules.)~~

~~Paragraphs (3) and (5) of former rule 35(c) contained overlapping and inconsistent provisions directing that copies of the record be shared in various ways if there were four or more appealing defendants. Because revised rule 32(c)(4) and (d)(2) require that a copy of each transcript be prepared for each additional appealing defendant represented by separate counsel, the former provisions for sharing copies are deleted as obsolete.~~

~~**Subdivision (f).** Revised rule 32(f) is derived from former rule 35(c) and (e). Former rule 35(e) purported to require that the district attorney send to the clerk any copy of the transcript that the clerk had previously sent to the district attorney at the latter's request (former rule 35(a), revised rule 32(c)(2)), and that the clerk then send that copy to the Attorney General. Revised rule 32(f) deletes that requirement for several reasons: it is inconsistent with the purpose of revised subdivision (c)(3), it is unnecessary because the Attorney General's Office receives its own copy of the transcript under revised subdivision (f)(1) (former rule 35(c)), and it does not conform to actual practice.~~

~~Revised rule 32(f)(2) fills a gap and reflects current practice (see also revised rule 31.2(a)(3)(B)).~~

~~**Former rule 35(e).** Former rule 35(e) provided for the transmission of certain exhibits to the reviewing court. Revised rule 31(e) now governs all matters relating to the transmission of exhibits.~~

~~**Former rule 35(f).** Former rule 35(f) has been moved to revised rule 31(f).~~

Rule 8.440. ~~32.1.~~ Augmenting or correcting the record in the Court of Appeal

(a) Subsequent trial court orders

If, after the record is certified, the trial court amends or recalls the judgment or makes any other order in the case, including an order affecting the sentence or probation, the clerk must promptly certify and send a copy of the amended abstract of judgment or other order—as an augmentation of the record—to the reviewing court, the probation officer, the defendant, the defendant's appellate counsel, and the Attorney General.

(b) Omissions

If, after the record is certified, the superior court clerk or the reporter learns that the record omits a document or transcript that any rule or order requires included, the clerk must promptly copy and certify the document or the reporter must promptly prepare and certify the transcript. Without the need for a court order, the clerk must promptly send the document or transcript—as an augmentation of the record—to the reviewing court, the defendant's appellate counsel, and the Attorney General.

(c) Defendant's appellate counsel not yet retained or appointed

If the defendant's appellate counsel has not yet been retained or appointed, the clerk must send to the district appellate project any document or transcript added to the record under (a) or (b).

(d) Augmentation or correction by the reviewing court

At any time, on motion of a party or on its own motion, the reviewing court may order the record augmented or corrected as provided in rule ~~12~~ 8.155.

Advisory Committee Comment [revised version]

Subdivision (b). The words "or order" in the first sentence of subdivision (b) are intended to refer to any court order to include additional material in the record, e.g., an order of the superior court pursuant to rule 8.424(d)(1).

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

~~**Subdivision (a).** Revised rule 32.1(a) combines related provisions of the first sentence of former rule 33(d) and the last paragraph of former rule 35(e).~~

Subdivision (b). ~~Revised rule 32.1(b) is the third paragraph of former rule 35(e).~~ The words "or order" ~~inserted~~ in the first sentence of subdivision (b) are intended to refer to any court order to include additional material in the record, e.g., an order of the superior court pursuant to ~~revised~~ rule ~~31.1~~ 8.424(d)(1).

~~**Subdivision (c).** Revised rule 32.1(c) restates the second sentence of former rule 33(d), modified to conform to current practice (see also revised rule 31.2(a)(3)(B)).~~

~~**Subdivision (d).** Revised rule 32.1(d) is new. It is not a substantive change, but is a cross-reference inserted in this rule to clarify the applicability of rule 12 to criminal appeals.~~

Rule 8.444. ~~32.2.~~ Agreed statement

If the parties present the appeal on an agreed statement, they must comply with the relevant provisions of rule ~~6~~ 8.134, but the appellant must file an original and three copies of the statement in superior court within 25 days after filing the notice of appeal.

~~**Advisory Committee Comment (2004)**~~

~~Revised rule 32.2 is former rule 36(a).~~

Rule 8.446. ~~32.3.~~ Settled statement

(a) Application

As soon as a party learns that any portion of the oral proceedings cannot be transcribed, the party may serve and file in superior court an application for permission to prepare a settled statement. The application must explain why the oral proceedings cannot be transcribed.

(b) Order and proposed statement

The judge must rule on the application within five days after it is filed. If the judge grants the application, the parties must comply with the relevant provisions of rule ~~7~~ 8.137, but the applicant must deliver a proposed statement to the judge for settlement within 30 days after it is ordered, unless the reviewing court extends the time.

(c) Serving and filing the settled statement

The applicant must prepare, serve, and file in superior court an original and three copies of the settled statement.

~~**Advisory Committee Comment (2004)**~~

~~Revised rule 32.3 is based on former rule 36(b).~~

~~**Subdivision (a).** Former rule 36(b) authorized only appellants to apply for permission to prepare a settled statement when a portion of the oral proceedings could not be transcribed. In a substantive change, revised rule 32.3(a) expands this authority to include any party: no reason appears to deny respondents the opportunity to seek such relief.~~

~~Revised rule 32.3(a) also deletes as unnecessary formalisms the former requirements that the application be "verified" and include, as an alternative to a statement of the facts, a "certificate" of the clerk showing that a reporter's transcript cannot be obtained; under the revised rule, the application must simply "explain why the oral proceedings cannot be transcribed." The sufficiency of that explanation is for the court to decide. The change is substantive.~~

Article 3. Briefs, Hearing, and Decision

Rule 8.460. ~~33.~~ Briefs by parties and amici curiae

(a) Contents and form

Except as provided in this rule, briefs in criminal appeals must comply as nearly as possible with rules ~~13~~ 8.200 and ~~14~~ 8.204.

(b) Length

(1) A brief produced on a computer must not exceed 25,500 words, including footnotes. Such a brief must include a certificate by appellate counsel or an unrepresented defendant stating the number of words in the brief; the person certifying may rely on the word count of the computer program used to prepare the brief.

(2) A typewritten brief must not exceed 75 pages.

(3) The tables, a certificate under (1), and any attachment permitted under rule ~~14~~ 8.204(d) are excluded from the limits stated in (1) or (2).

(4) A combined brief in an appeal governed by (e) must not exceed double the limit stated in (1) or (2).

(5) On application, the presiding justice may permit a longer brief for good cause.

(c) Time to file

(1) The appellant's opening brief must be served and filed within 40 days after the record is filed in the reviewing court.

(2) The respondent's brief must be served and filed within 30 days after the appellant's opening brief is filed.

(3) The appellant must serve and file a reply brief, if any, within 20 days after the respondent files its brief.

(4) The time to serve and file a brief may not be extended by stipulation, but only by order of the presiding justice under rule ~~45~~ 8.60.

(5) Rule ~~17~~ 8.220 applies if a party fails to timely file an appellant's opening brief or a respondent's brief, but the period specified in the notice required by that rule must be 30 days.

(d) Service

(1) Defendant's appellate counsel must serve each brief for the defendant on the People and the district attorney, and must send a copy of each to the defendant personally unless the defendant requests otherwise.

(2) The proof of service under (1) must state that a copy of the defendant's brief was sent to the defendant, or counsel must file a signed statement that the defendant requested in writing that no copy be sent.

(3) For each appealing defendant, the People must serve two copies of their briefs on the defendant's appellate counsel and one copy on the district appellate project.

(4) A copy of each brief must be served on the superior court clerk for delivery to the trial judge.

(e) When a defendant and the People appeal

When both a defendant and the People appeal, the defendant must file the first opening brief unless the reviewing court orders otherwise, and rule ~~16~~ 8.216(b) governs the contents of the briefs.

(f) Amicus curiae briefs

Amicus curiae briefs may be filed as provided in rule ~~13~~ 8.200(c).

Advisory Committee Comment [revised version]

Subdivision (b). Subdivision (b)(1) states the maximum permissible length of a brief produced on a computer in terms of word count rather than page count. This provision tracks a provision in rule 8.204(c) governing Court of Appeal briefs and is explained in the comment to that provision. The word count assumes a brief using one-and-one-half spaced lines of text, as permitted by rule 8.204(b)(5).

The maximum permissible length of briefs in death penalty appeals is prescribed in rule 8.530.

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

~~Revised rule 33 is based on former rule 37.~~

Subdivision (b). ~~Revised rule 33~~Subdivision (b)(1) states the maximum permissible length of a brief produced on a computer in terms of word count rather than page count. This ~~substantive change~~ provision tracks a provision in ~~revised~~ rule ~~14~~ 8.204(c) governing Court of Appeal briefs~~,~~ and is explained in the comment to that provision. The word count assumes a brief using one-and-one-half spaced lines of text, as permitted by rule ~~14~~ 8.204(b)(5).

The maximum permissible length of briefs in death penalty appeals is prescribed in ~~revised~~ rule ~~36~~ 8.530.

~~**Subdivision (c).** For completeness, revised rule 33(c)(4) adds a cross-reference to the general provision of rule 45 allowing extensions of time to file briefs by order of the presiding justice. The provision tracks an identical provision in the rule governing briefs on the merits in the Supreme Court (rule 29.1(a)(5)).~~

~~**Subdivision (d).** Revised rule 33(d)(3) requires the People to serve one copy of their briefs on the appellate project for the district and an extra copy for each additional appealing defendant. This is a substantive change but reflects common practice.~~

~~**Subdivision (e).** Revised rule 33(e) fills a gap by providing for cases in which both a defendant and the People appeal. It is derived from rule 16, adapted to criminal appeals.~~

~~**Subdivision (f).** Revised rule 33(f) is a cross-reference provision added to clarify the applicability of rule 13(c) to criminal appeals.~~

Rule 8.466. ~~33.1.~~ Hearing and decision in the Court of Appeal

Rules ~~21~~ 8.248 through ~~27~~ 8.276 govern the hearing and decision in the Court of Appeal of an appeal in a criminal case.

~~**Advisory Committee Comment (2004)**~~

~~Revised rule 33.1 is new but is not a substantive change. It clarifies the applicability, to noncapital criminal appeals, of the relevant rules governing the hearing and decision of civil appeals in the Court of Appeal.~~

Rule 8.468. ~~33.2.~~ Hearing and decision in the Supreme Court

Rules ~~28~~ 8.300 through ~~29.9~~ 8.352 govern the hearing and decision in the Supreme Court of an appeal in a criminal case.

~~**Advisory Committee Comment (2004)**~~

~~Revised rule 33.2 is new but is not substantive change. It clarifies the applicability, to noncapital criminal appeals, of the rules governing the hearing and decision of civil appeals in the Supreme Court.~~

Chapter 4. Appeals From Judgments of Death

Article 1. General Provisions

Rule 8.500. ~~34.~~ In general

(a) Automatic appeal to Supreme Court

If a judgment imposes a sentence of death, an appeal by the defendant is automatically taken to the Supreme Court.

(b) Copies of judgment

When a judgment of death is rendered, the superior court clerk must immediately send certified copies of the commitment to the Supreme Court, the Attorney General, the Governor, and the California Appellate Project in San Francisco.

(c) Extensions of time

When a rule in this part authorizes a trial court to grant an extension of a specified time period, the court must consider the relevant policies and factors stated in rule ~~45.5~~ 8.63.

(d) Supervising preparation of record

The Supreme Court clerk, under the supervision of the Chief Justice, must take all appropriate steps to ensure that superior court clerks and reporters promptly perform their duties under the rules in this part. This provision does not affect the superior courts' responsibility for the prompt preparation of appellate records in capital cases.

(e) Definitions

For purposes of this part:

(1) The delivery date of a transcript sent by mail is the mailing date plus five days, and

(2) "Trial counsel" means both the defendant's trial counsel and the prosecuting attorney.

~~**Advisory Committee Comment (2004)**~~

~~Revised rule 34 restates former rule 39.50 and related provisions of the Penal Code.~~

~~**Subdivision (a).** Revised rule 34(a) is derived from Penal Code section 1239(b).~~

~~**Subdivision (b).** Revised rule 34(b) is derived from Penal Code sections 1217 and 1218 and former rule 39.50(c). Filling a gap, the revised rule requires the clerk to send a certified copy of the commitment to the California Appellate Project in San Francisco. That entity also receives copies of the record when it is certified as complete (revised rule 35.1(g)(2)) and when it is certified as accurate (revised rule 35.2(e)(2)).~~

~~**Subdivision (c).** In determining whether to grant an extension of time under these rules, former rule 39.50(d) made it permissible for a trial court to consider the relevant policies and factors listed in rule 45.5. But rule 45.5 *requires* the Supreme Court and the Court of Appeal to consider those same policies and factors (rule 45.5(c)), and no reason appears for a different rule in the case of the trial courts. Moreover, the list of such factors in rule 45.5 is so comprehensive that it is difficult to conceive of a factor that a trial court could properly consider that is not found in that rule. (See, e.g., rule 45.5(c)(9)~~

~~["Any other factor which in the context of a particular case constitutes good cause"].) In a substantive change, revised rule 34(c) therefore provides that in determining whether to grant an extension, a trial court *must* consider the relevant policies and factors stated in rule 45.5.~~

~~The "relevant" policies and factors that the trial court must consider are those which are relevant to appeals from judgments of death. One of those factors is particularly relevant to such appeals, i.e., "[t]he number and complexity of the issues raised . . . and the length of the record, . . . including the number of relevant trial exhibits." (Rule 45.5(c)(3).) The "average-length record" described in the second sentence of rule 45.5(c)(3), however, refers to records in civil and noncapital criminal cases; the average-length record in capital cases is much longer.~~

~~**Subdivision (d).** Revised rule 34(d) is former rule 35(h).~~

~~**Subdivision (e).** Revised rule 34(e)(2) restates Penal Code section 190.8(i).~~

~~**Former subdivision (b).** Subdivision (b) of former rule 39.50 – which provided that the rules in this part must be "interpreted to effectuate the intent of the Legislature, as stated in Penal Code section 190.8" – is deleted as unnecessary: any rule of court that implements a statute must be construed to effectuate the intent of that statute.~~

Rule 8.505. ~~76.6.~~ Qualifications of counsel in death penalty appeals and habeas corpus proceedings

(a) Purpose

This rule defines the minimum qualifications for attorneys appointed by the Supreme Court in death penalty appeals and habeas corpus proceedings related to sentences of death. An attorney is not entitled to appointment simply because the attorney meets these minimum qualifications.

(b) General qualifications

The Supreme Court may appoint an attorney only if it has determined, after reviewing the attorney's experience, writing samples, references, and evaluations under (d) through (f), that the attorney has demonstrated the commitment, knowledge, and skills necessary to competently represent the defendant. An appointed attorney must be willing to cooperate with an assisting counsel or entity that the court may designate.

(c) Definitions

As used in this rule:

(1) "Appointed counsel" or "appointed attorney" means an attorney appointed to represent a person in a death penalty appeal or death penalty–related habeas

corpus proceedings in the Supreme Court. Appointed counsel may be either lead counsel or associate counsel.

(2) "Lead counsel" means an appointed attorney or an attorney in the Office of the State Public Defender, the Habeas Corpus Resource Center, or the California Appellate Project in San Francisco who is responsible for the overall conduct of the case and for supervising the work of associate and supervised counsel. If two or more attorneys are appointed to represent a defendant jointly in a death penalty appeal, in death penalty–related habeas corpus proceedings, or in both classes of proceedings together, one such attorney will be designated as lead counsel.

(3) "Associate counsel" means an appointed attorney who does not have the primary responsibility for the case but nevertheless has casewide responsibility to perform the duties for which that attorney was appointed, whether they are appellate, habeas corpus, or appellate and habeas corpus duties. Associate counsel must meet the same minimum qualifications as lead counsel.

(4) "Supervised counsel" means an attorney who works under the immediate supervision and direction of lead or associate counsel but is not appointed by the Supreme Court. Supervised counsel must be an active member of the State Bar of California.

(5) "Assisting counsel or entity" means an attorney or entity designated by the Supreme Court to provide appointed counsel with consultation and resource assistance. Entities that may be designated include the Office of the State Public Defender, the Habeas Corpus Resource Center, and the California Appellate Project in San Francisco.

(d) Qualifications for appointed appellate counsel

An attorney appointed as lead or associate counsel in a death penalty appeal must have at least the following qualifications and experience:

(1) Active practice of law in California for at least four years.

(2) Either:

(A) Service as counsel of record for a defendant in seven completed felony appeals, including one murder case; or

(B) Service as counsel of record for a defendant in five completed felony appeals and as supervised counsel for a defendant in two death penalty appeals in which the opening brief has been filed. Service as supervised counsel in a death penalty appeal will apply toward this qualification only if lead or associate counsel in that appeal attests that the supervised attorney performed substantial work on the case and recommends the attorney for appointment.

(3) Familiarity with Supreme Court practices and procedures, including those related to death penalty appeals.

(4) Within three years before appointment, completion of at least nine hours of Supreme Court–approved appellate criminal defense training, continuing education, or course of study, at least six hours of which involve death penalty appeals. If the Supreme Court has previously appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years before the request for a new appointment, the court, after reviewing counsel's previous work, may find that such representation constitutes compliance with this requirement.

(5) Proficiency in issue identification, research, analysis, writing, and advocacy, taking into consideration all of the following:

(A) Two writing samples—ordinarily appellate briefs—written by the attorney and presenting an analysis of complex legal issues;

(B) If the attorney has previously been appointed in a death penalty appeal or death penalty–related habeas corpus proceeding, the evaluation of the assisting counsel or entity in that proceeding;

(C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and

(D) If the attorney is on a panel of attorneys eligible for appointments to represent indigents in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

(e) Qualifications for appointed habeas corpus counsel

An attorney appointed as lead or associate counsel to represent a person in death penalty–related habeas corpus proceedings must have at least the following qualifications and experience:

(1) Active practice of law in California for at least four years.

(2) Either:

(A) Service as counsel of record for a defendant in five completed felony appeals or writ proceedings, including one murder case, and service as counsel of record for a defendant in three jury trials or three habeas corpus proceedings involving serious felonies; or

(B) Service as counsel of record for a defendant in five completed felony appeals or writ proceedings and service as supervised counsel in two death penalty–related habeas corpus proceedings in which the petition has been filed. Service as supervised counsel in a death penalty–related habeas corpus proceeding will apply toward this qualification only if lead or associate counsel in that proceeding attests that the attorney performed substantial work on the case and recommends the attorney for appointment.

(3) Familiarity with the practices and procedures of the California Supreme Court and the federal courts in death penalty–related habeas corpus proceedings.

(4) Within three years before appointment, completion of at least nine hours of Supreme Court–approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least six hours of which address death penalty habeas corpus proceedings. If the Supreme Court has previously appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years before the request for a new appointment, the court, after reviewing counsel's previous work, may find that such representation constitutes compliance with this requirement.

(5) Proficiency in issue identification, research, analysis, writing, investigation, and advocacy, taking into consideration all the following:

(A) Three writing samples—ordinarily two appellate briefs and one habeas corpus petition—written by the attorney and presenting an analysis of complex legal issues;

(B) If the attorney has previously been appointed in a death penalty appeal or death penalty–related habeas corpus proceeding, the evaluation of the assisting counsel or entity in that proceeding;

(C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and

(D) If the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

(f) Alternative qualifications

The Supreme Court may appoint an attorney who does not meet the requirements of (d)(1) and (2) or (e)(1) and (2) if the attorney has the qualifications described in (d)(3)–(5) or (e)(3)–(5) and:

(1) The court finds that the attorney has extensive experience in another jurisdiction or a different type of practice (such as civil trials or appeals, academic work, or work for a court or prosecutor) for at least four years, providing the attorney with experience in complex cases substantially equivalent to that of an attorney qualified under (d) or (e).

(2) Ongoing consultation is available to the attorney from an assisting counsel or entity designated by the court.

(3) Within two years before appointment, the attorney has completed at least 18 hours of Supreme Court–approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least nine hours of which involve death penalty appellate or habeas corpus proceedings. The Supreme Court will determine in each case whether the training, education, or course of study completed by a particular attorney satisfies the requirements of this subdivision in light of the attorney's individual background and experience. If the Supreme Court has previously appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years before the request for a new appointment, the court, after reviewing counsel's previous work, may find that such representation constitutes compliance with this requirement.

(g) Attorneys without trial experience

If an evidentiary hearing is ordered in a death penalty–related habeas corpus proceeding and an attorney appointed under either (e) or (f) to represent a defendant in that proceeding lacks experience in conducting trials or evidentiary hearings, the attorney must associate an attorney who has such experience.

(h) Use of supervised counsel

An attorney who does not meet the qualifications described in (d), (e), or (f) may assist lead or associate counsel, but must work under the immediate supervision and direction of lead or associate counsel.

(i) Appellate and habeas corpus appointment

(1) An attorney appointed to represent a defendant in both a death penalty appeal and death penalty–related habeas corpus proceedings must meet the minimum qualifications of both (d) and (e) or of (f).

(2) Notwithstanding (1), two attorneys together may be eligible for appointment to represent a defendant jointly in both a death penalty appeal and death penalty–related habeas corpus proceedings if the Supreme Court finds that their qualifications in the aggregate satisfy the provisions of both (d) and (e) or of (f).

(j) Designated entities as appointed counsel

(1) Notwithstanding any other provision of this rule, the State Public Defender is qualified to serve as appointed counsel in death penalty appeals, the Habeas Corpus Resource Center is qualified to serve as appointed counsel in death penalty–related habeas corpus proceedings, and the California Appellate Project in San Francisco is qualified to serve as appointed counsel in both classes of proceedings.

(2) When serving as appointed counsel in a death penalty appeal, the State Public Defender or the California Appellate Project in San Francisco must not assign any attorney as lead counsel unless it finds the attorney qualified under (d)(1)–(5) or the Supreme Court finds the attorney qualified under (f).

(3) When serving as appointed counsel in a death penalty–related habeas corpus proceeding, the Habeas Corpus Resource Center or the California Appellate Project in San Francisco must not assign any attorney as lead counsel unless it finds the attorney qualified under (e)(1)–(5) or the Supreme Court finds the attorney qualified under (f).

(k) Attorney appointed by federal court

Notwithstanding any other provision of this rule, the Supreme Court may appoint an attorney who is under appointment by a federal court in a death penalty–related habeas corpus proceeding for the purpose of exhausting state remedies in the

Supreme Court and for all subsequent state proceedings in that case, if the Supreme Court finds that attorney has the commitment, proficiency, and knowledge necessary to represent the defendant competently in state proceedings.

Advisory Committee Comment [revised version]

Subdivision (c). The definition of "associate counsel" in subdivision (c)(3) is intended to make it clear that although appointed lead counsel has overall and supervisory responsibility in a capital case, appointed associate counsel also has casewide responsibility to perform the duties for which he or she was appointed, whether they are appellate duties, habeas corpus duties, or appellate *and* habeas corpus duties.

Advisory Committee Comment [version showing revisions]

Subdivision (c). The definition of "associate counsel" in ~~revised rule 76.6~~subdivision (c)(3) is intended to make it clear that although appointed lead counsel has overall and supervisory responsibility in a capital case, appointed associate counsel also has casewide responsibility to perform the duties for which he or she was appointed, whether they are appellate duties, habeas corpus duties, or appellate *and* habeas corpus duties. ~~The change is not substantive.~~

Article 2. Record on Appeal

Rule 8.510. ~~34.1.~~ Contents and form of the record

(a) Contents of the record

(1) The record must include a clerk's transcript containing:

(A) All items listed in rule ~~31~~ 8.420(b), except item (10);

(B) All items listed in rule ~~31.1~~ 8.424(b)(1), whether or not requested; and

(C) Any other document filed or lodged in the case, including each juror questionnaire, whether or not the juror was selected.

(2) The record must include a reporter's transcript containing:

(A) All items listed in rule ~~31~~ 8.420(c);

(B) All items listed in rule ~~31.1~~ 8.424(b)(2), whether or not requested; and

(C) Any other oral proceedings in the case, including any proceedings that did not result in a verdict or sentence of death because the court ordered a mistrial or a new trial.

(3) All exhibits admitted in evidence, refused, or lodged are deemed part of the record, but may be transmitted to the reviewing court only as provided in rule ~~36.1~~ 8.534.

(4) The superior court or the Supreme Court may order that the record include additional material.

(b) Confidential records

(1) All documents filed or lodged confidentially under Penal Code section 987.9 or 987.2 must be sealed. Documents filed or lodged under Penal Code section 987.9 must be bound separately from documents filed under Penal Code section 987.2. Unless otherwise ordered, copies must be provided only to the Supreme Court and to counsel for the defendant to whom the documents relate.

(2) All reporter's transcripts of in camera proceedings must be sealed. Unless otherwise ordered, copies must be provided only to the Supreme Court and to counsel for parties present at the proceedings.

(3) Records sealed under this rule must comply with rule ~~31.2~~ 8.428.

(c) Juror-identifying information

Any document in the record containing juror-identifying information must be edited in compliance with rule ~~31.3~~ 8.432. Unedited copies of all such documents and a copy of the table required by the rule, under seal and bound together, must be included in the record sent to the Supreme Court.

(d) Form of record

The clerk's transcript and the reporter's transcript must comply with rule ~~9~~ 8.144, but the indexes for the clerk's transcript must separately list all sealed documents in that transcript, and the indexes for the reporter's transcript must separately list all sealed reporter's transcripts with the date and the names of all parties present. The indexes must not list any material relating to a request for funds under Penal Code section 987.9 or disclose the substance of any sealed matter.

Advisory Committee Comment [revised version]

Subdivision (a). Subdivision (a) restates Penal Code section 190.7(a).

Subdivision (b). Under the third sentence of subdivision (b)(1), copies of sealed documents must be given only to the Supreme Court and to the defendant concerned "[u]nless otherwise ordered." The qualification recognizes the statutory right of the Attorney General to request, under certain circumstances, copies of documents filed confidentially under Penal Code section 987.9(d). To facilitate compliance with such requests, the second sentence of rule 8.510(b)(1) requires such documents to be bound separately from documents filed confidentially under Penal Code section 987.2.

Subdivision (d). Subdivision (d) requires that the master indexes of the clerk and reporter's transcripts separately list all documents and transcripts each contains that were filed in sealed form under subdivision (b). The purpose of this provision is to assist the parties in making—and the court in adjudicating—motions to unseal portions of the record. To protect confidentiality until a record is unsealed, however, each index must endeavor to identify the sealed matter it lists without disclosing its substance.

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

Subdivision (a). Subdivision (a) ~~of revised rule 34.1~~ restates Penal Code section 190.7(a)~~ and former rule 39.51(a) and (c)~~.

Subdivision (b). Under the third sentence of ~~revised rule 34.1~~subdivision (b)(1), copies of sealed documents must be given only to the Supreme Court and to the defendant concerned "[u]nless otherwise ordered." The qualification ~~is added in recognition of~~ recognizes the statutory right of the Attorney General to request, under certain circumstances, copies of documents filed confidentially under Penal Code section 987.9(d). To facilitate compliance with such requests, the second sentence of ~~revised~~ rule ~~34.1~~ 8.510(b)(1) requires such documents to be bound separately from documents filed confidentially under Penal Code section 987.2.

~~Paragraph (3) of revised rule 34.1(b) implements the purpose of the subdivision by requiring compliance with revised rule 31.2 in capital cases.~~

~~**Subdivision (c).** The first sentence of revised rule 34.1(c) fills a gap by requiring compliance with revised rule 31.3 in capital cases, i.e., by requiring the editing of all documents in the record to delete any juror-identifying information. The second sentence restates paragraph (3) of former rule 33.6.~~

Subdivision (d). ~~Revised rule 34.1(d) moves to a more appropriate location provisions of former rule 39.53(b)(1) and (3) requiring that the clerk's and reporter's transcripts comply with rule 9.~~

~~Revised rule 34.1~~Subdivision (d) ~~fills a gap by requiring~~ requires that the master indexes of the clerk and reporter's transcripts separately list all documents and transcripts each contains that were filed in sealed form under subdivision (b). The purpose of this ~~substantive change~~ provision is to assist the parties in making—and the court in adjudicating—motions to unseal portions of the record. To protect confidentiality until a record is unsealed, however, each index must endeavor to identify the sealed matter it lists without disclosing its substance.

Rule 8.513. ~~34.2.~~ Preparing and certifying the record of preliminary proceedings

(a) Definitions

For purposes of this rule:

(1) The "preliminary proceedings" are all proceedings held prior to and including the filing of the information or indictment, whether in open court or otherwise, and include the preliminary examination or grand jury proceeding;

(2) The "record of the preliminary proceedings" is the court file and the reporter's transcript of the preliminary proceedings;

(3) The "responsible judge" is the judge assigned to try the case or, if none is assigned, the presiding superior court judge or designee of the presiding judge; and

(4) The "designated judge" is the judge designated by the presiding judge to supervise preparation of the record of preliminary proceedings.

(b) Notice of intent to seek death penalty

In any case in which the death penalty may be imposed:

(1) If the prosecution notifies the responsible judge that it intends to seek the death penalty, the judge must notify the presiding judge and the clerk. The clerk must promptly enter the information in the court file.

(2) If the prosecution does not give notice under (1)—and does not give notice to the contrary—the clerk must notify the responsible judge 60 days before the first date set for trial that the prosecution is presumed to seek the death penalty. The judge must notify the presiding judge, and the clerk must promptly enter the information in the court file.

(c) Assignment of judge designated to supervise preparation of record of preliminary proceedings

(1) Within five days after receiving notice under (b), the presiding judge must designate a judge to supervise preparation of the record of the preliminary proceedings.

(2) If there was a preliminary examination, the designated judge must be the judge who conducted it.

(d) Notice to prepare transcript

Within five days after receiving notice under (b)(1) or notifying the judge under (b)(2), the clerk must notify each reporter who reported a preliminary proceeding to

prepare a transcript of the proceeding. If there is more than one reporter, the designated judge may assign a reporter or another designee to perform the functions of the primary reporter.

(e) Reporter's duties

(1) The reporter must prepare an original and five copies of the reporter's transcript and two additional copies for each codefendant against whom the death penalty is sought. The transcript must include the preliminary examination or grand jury proceeding unless a transcript of that examination or proceeding has already been filed in superior court for inclusion in the clerk's transcript.

(2) The reporter must certify the original and all copies of the reporter's transcript as correct.

(3) Within 20 days after receiving the notice to prepare the reporter's transcript, the reporter must deliver the original and all copies of the transcript to the clerk.

(f) Review by counsel

(1) Within five days after the reporter delivers the transcript, the clerk must deliver the original to the designated judge and one copy to each trial counsel. If a different attorney represented the defendant or the People in the preliminary proceedings, both attorneys must perform the tasks required by (2).

(2) Each trial counsel must promptly:

(A) Review the reporter's transcript for errors or omissions;

(B) Review the docket sheets and minute orders to determine whether all preliminary proceedings have been transcribed;

(C) Consult with opposing counsel to determine whether any other proceedings or discussions should have been transcribed; and

(D) Review the court file to determine whether it is complete.

(g) Declaration and request for corrections or additions

(1) Within 30 days after the clerk delivers the transcript, each trial counsel must serve and file a declaration stating that counsel or another person under counsel's supervision has performed the tasks required by (f), and must serve and file either:

(A) A request for corrections or additions to the reporter's transcript or court file, or

(B) A statement that counsel does not request any corrections or additions.

(2) If a different attorney represented the defendant in the preliminary proceedings, that attorney must also file the declaration required by (1).

(3) A request for additions to the reporter's transcript must state the nature and date of the proceedings and, if known, the identity of the reporter who reported them.

(4) If any counsel fails to timely file a declaration under (1), the designated judge must not certify the record and must set the matter for hearing, require a showing of good cause why counsel has not complied, and fix a date for compliance.

(h) Corrections or additions to the record of preliminary proceedings

If any counsel files a request for corrections or additions:

(1) Within 15 days after the last request is filed, the designated judge must hold a hearing and order any necessary corrections or additions.

(2) If any portion of the proceedings cannot be transcribed, the judge may order preparation of a settled statement under rule ~~32.3~~ 8.446.

(3) Within 20 days after the hearing under (1), the original reporter's transcript and court file must be corrected or augmented to reflect all corrections or additions ordered. The clerk must promptly send copies of the corrected or additional pages to trial counsel.

(4) The judge may order any further proceedings to correct or complete the record of the preliminary proceedings.

(5) When the judge is satisfied that all corrections and additions ordered have been made and copies of all corrected or additional pages have been sent to

the parties, the judge must certify the record of the preliminary proceedings as complete and accurate.

(6) The record of the preliminary proceedings must be certified as complete and accurate within 120 days after the presiding judge orders preparation of the record.

(i) Computer-readable copies

(1) When the record of the preliminary proceedings is certified as complete and accurate, the clerk must promptly notify the reporter to prepare five computer-readable copies of the transcript and two additional computer-readable copies for each codefendant against whom the death penalty is sought.

(2) Each computer-readable copy must comply with the format, labeling, content, and numbering requirements of Code of Civil Procedure section 271~~, subdivision~~ (b)~~,~~ and any additional requirements prescribed by the Supreme Court, and must be further labeled to show the date it was made.

(3) A computer-readable copy of a sealed transcript must be placed on a separate disk and clearly labeled as confidential.

(4) The reporter is to be compensated for computer-readable copies as provided in Government Code section 69954~~, subdivision~~ (b).

(5) Within 20 days after the clerk notifies the reporter under (1), the reporter must deliver the computer-readable copies to the clerk.

(j) Delivery to superior court

Within five days after the reporter delivers the computer-readable copies, the clerk must deliver to the responsible judge, for inclusion in the record:

(1) The certified original reporter's transcript of the preliminary proceedings and the copies that have not been distributed to counsel, including the computer-readable copies, and

(2) The complete court file of the preliminary proceedings or a certified copy of that file.

(k) Extension of time

(1) Except as provided in (2), the designated judge may extend for good cause any of the periods specified in this rule.

(2) The period specified in (h)(6) may be extended only as follows:

(A) The designated judge may request an extension of the period by presenting a declaration to the responsible judge explaining why the time limit cannot be met, and

(B) The responsible judge may order an extension not exceeding 90 additional days; in an exceptional case the judge may order an extension exceeding 90 days, but must state on the record the specific reason for the greater extension.

(*l*) Notice that death penalty is no longer sought

After the presiding judge has ordered preparation of the pretrial record, if the death penalty is no longer sought, the clerk must promptly notify the reporter that this rule does not apply.

Advisory Committee Comment [revised version]

Rule 8.513 implements Penal Code section 190.9(a). Rules 8.513–8.522 govern the process of preparing and certifying the record in any appeal from a judgment of death imposed after a trial that began on or after January 1, 1997; specifically, rule 8.513 provides for the record of the preliminary proceedings in such an appeal. Rule 8.525 governs the process of certifying the record in any appeal from a judgment of death imposed after a trial that began before January 1, 1997.

Subdivision (f). As used in subdivision (f)—as in all rules in this chapter—trial counsel "means both the defendant's trial counsel and the prosecuting attorney." (Rule 8.500(e)(2).)

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

~~Revised rule 34.2 is former rule 39.52 and~~ Rule 8.513 implements Penal Code section 190.9(a). ~~Revised rules 34.2–35.2~~ Rules 8.513–8.522 govern the process of preparing and certifying the record in any appeal from a judgment of death imposed after a trial that began on or after January 1, 1997; specifically, ~~revised~~ rule ~~34.2~~ 8.513 provides for the record of the preliminary proceedings in such an appeal. ~~Revised r~~Rule ~~35.3~~ 8.525 governs the process of certifying the record in any appeal from a judgment of death imposed after a trial that began before January 1, 1997.

~~**Subdivision (a).** Revised rule 34.2(a)(1) fills a gap by including grand jury proceedings among the preliminary proceedings it defines. Grand jury proceedings may also result in judgments of death, although their use for that purpose is limited.~~

~~Former rule 39.52(b)(1) used the phrase "responsible superior court judge" to refer to the judge assigned to try the case. Because all trial judges are superior court judges after trial court unification, revised rule 34.2(a)(3) deletes the qualifier "superior court" as unnecessary.~~

~~**Subdivision (b).** Former rule 39.52(b) directed the judge to "enter . . . on the record" the fact that the prosecution has given notice of intent to seek the death penalty. Recognizing that it is normally the clerk rather than the judge who makes docket entries, revised rule 34.2(b)(1) instead directs the judge to notify the clerk of the prosecution's notice and directs the clerk to enter that fact in the court file. Similarly, revised rule 34.2(b)(2) clarifies the operation of the presumption of prosecution intent declared by former rule 39.52(b)(2).~~

Subdivision (f). As used in ~~revised rule 34.2~~subdivision (f)—as in all rules in this ~~part~~chapter—trial counsel "means both the defendant's trial counsel and the prosecuting attorney." (~~Revised rule 34~~ Rule 8.500(e)(2).)

~~**Subdivision (g).** Revised rule 34.2(g)(1), like former rule 39.52(h), requires counsel to file a declaration stating that counsel has performed the tasks required by the rule, i.e., has reviewed the record for completeness and accuracy. Under the former rule, counsel who was satisfied with the state of the record—and therefore had determined not to request any corrections or additions—simply remained silent in regard to any such request, and the court was required to infer from that silence that counsel did not intend to make a request. In a substantive change designed to prevent any misunderstanding of counsel's intent on this important point, revised rule 34.2(g)(1)(B) requires counsel not intending to request corrections or additions to make a statement to that effect as part of the required declaration.~~

~~Revised rule 34.2(g)(3) fills a gap; it is derived from former rule 39.55(b).~~

~~Former rule 39.52(i) declared that if any counsel failed to file either the declaration required by the rule or a request for extension of time, the court was directed to "use all reasonable means to ensure compliance with this rule." Although revised rule 34.2(g)(4) deletes the quoted language because it duplicates the governing statute (Pen. Code, § 190.8(a)), the directive remains in force by operation of the statute; for the purposes of the rule, however, it is sufficient to specify—as did the former rule—that in such event the court must set the matter for hearing, require a showing of good cause why counsel has not complied, and fix a date for compliance.~~

~~**Subdivision (h).** Revised rule 34.2(h)(2) fills a gap and reflects current practice. Revised rule 34.2(h)(6) restates a provision of Penal Code section 190.9(a)(2).~~

~~**Subdivision (i).** Former rule 39.52(i)(6) required the reporter to prepare six computer-readable copies of the corrected transcript of the preliminary proceedings. Because the subsequent rules governing preparation of the record in appeals from judgments of death call for only five such copies (former rules 39.53–39.57; revised rules 35–35.3), revised rule 34.2(i)(1) requires the reporter to prepare only five computer-readable copies of the corrected transcript of the preliminary proceedings.~~

~~Former rule 39.52(i)(6) required the computer-readable copies of the transcript to comply with former Code of Civil Procedure section 269(c), and former rule 35(b), and the latter rule specified that such copies must be on "CD-ROM or 3.5-inch disks." Rather than enshrining any particular technology in these rules, however, revised rule 34.2(i)(2) simply states that computer-readable copies must comply with the statute (now Code Civ. Proc., § 271(b)) and "any additional requirements prescribed by the~~

~~Supreme Court." The change is not meant to be substantive, but to provide the flexibility necessary to ensure the record-preparation process remains current with evolving computer technology.~~

~~Revised rule 34.2(i)(3) fills a gap; it is derived from former rule 39.54(f). Revised rule 34.2(i)(4) restates a provision of former rule 35(b), second paragraph.~~

~~**Subdivision (j).** Former rule 39.52(j) required the clerk to send the record of the preliminary proceedings—including the computer-readable copies—to the responsible superior court judge "[n]o later than five days after the record has been certified." This provision created an apparent inconsistency with former rule 39.52(i)(6), which gave the reporter 20 days to prepare the same computer-readable copies after the judge certified the record (see former rule 39.52(i)(5)). To resolve this inconsistency, revised rule 34.2(j) provides instead that the five-day period for the clerk to act begins when the reporter delivers the computer-readable copies to the clerk.~~

~~**Subdivision (*l*).** Former rule 39.52(k) required the clerk to notify the reporter if at any time the death penalty was no longer sought "or available." Revised rule 34.2(*l*) deletes the quoted phrase as superfluous: it is assumed the prosecution will not seek the death penalty if for any reason the penalty is or becomes unavailable.~~

Rule 8.516. ~~35.~~ Preparing the trial record

(a) Clerk's duties

(1) The clerk must promptly—and no later than five days after the judgment of death is rendered—notify the reporter to prepare the reporter's transcript.

(2) The clerk must prepare an original and eight copies of the clerk's transcript and two additional copies for each codefendant sentenced to death.

(3) The clerk must certify the original and all copies of the clerk's transcript as correct.

(b) Reporter's duties

(1) The reporter must prepare an original and five copies of the reporter's transcript and two additional copies for each codefendant sentenced to death.

(2) Any portion of the transcript transcribed during trial must not be retyped unless necessary to correct errors, but must be repaginated and bound with any portion of the transcript not previously transcribed. Any additional copies needed must not be retyped but must be prepared by photocopying or an equivalent process.

(3) The reporter must certify the original and all copies of the reporter's transcript as correct and deliver them to the clerk.

(c) Sending the record to trial counsel

Within 30 days after the judgment of death is rendered, the clerk must deliver one copy of the clerk's and reporter's transcripts to each trial counsel, retaining the original transcripts and the remaining copies. If counsel does not receive the transcripts within that period, counsel must promptly notify the superior court.

(d) Extension of time

(1) On request of the clerk or a reporter and for good cause, the superior court may extend the period prescribed in (c) for no more than 30 days. For any further extension the clerk or reporter must file a request in the Supreme Court, showing good cause.

(2) A request under (1) must be supported by a declaration explaining why the extension is necessary. The court may presume good cause if the clerk's and reporter's transcripts combined will likely exceed 10,000 pages.

(3) If the superior court orders an extension under (1), the order must specify the reason justifying the extension. The clerk must promptly send a copy of the order to the Supreme Court.

Advisory Committee Comment [revised version]

Rule 8.516 implements Penal Code section 190.8(b).

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

~~Revised rule 35 is former rule 39.53 and~~Rule 8.516 implements Penal Code section 190.8(b).

~~**Subdivision (a).** Revised rule 35(a)(1) deletes the provision of former rule 39.53(b)(2) that required the clerk to deliver the notification of a judgment of death to the reporter "personally or to his or her office or internal mail receptacle" and authorized the clerk to mail the notification if the reporter was not a court employee; the provision was deemed unnecessary micromanagement of the clerk's office. (For the same reason, revised rules 4 and 32 delete similar provisions from the rules on appeals in civil cases and noncapital criminal cases, respectively.)~~

~~Revised rule 35(a)(2) deletes as redundant the provisions of former rule 39.53(b)(1) directing that the clerk's transcript must conform to rule 9 and must include the contents of the municipal court file. The form and contents of the clerk's transcript are prescribed in revised rule 34.1.~~

~~**Subdivision (b).** Revised rule 35(b)(1) deletes as redundant the provisions of former rule 39.53(b)(3) directing that the reporter's transcript must conform to rule 9. The form of the reporter's transcript is prescribed in revised rule 34.1.~~

~~**Subdivision (c).** Former rule 39.53(b)(4) directed that the copies of the clerk and reporter's transcripts that the clerk sent to trial counsel for review be paper copies. Revised rule 35(c) deletes this directive as superfluous: under revised rules 35.1 and 35.2 (former rules 39.54 and 39.55), computer-readable copies of the reporter's transcript are not prepared until the record has been certified as complete and accurate, and no such copies of the clerk's transcript are ever prepared.~~

~~Filling a gap, the second sentence of revised rule 35(c) restates a provision of Penal Code section 190.8, subdivision (b).~~

~~**Subdivision (d).** Former rule 39.53(b)(6) authorized the court to presume good cause to extend the time to prepare the transcripts in cases in which the clerk and reporter's transcripts combined "exceed" 10,000 pages. By definition, however, the transcripts have not been completed at that point in the process, and so it may not be possible to know whether they exceed 10,000 pages. Revised rule 35(d)(2) therefore provides that good cause may be presumed when the combined transcripts "will likely" exceed 10,000 pages.~~

Rule 8.519. ~~35.1.~~ Certifying the trial record for completeness

(a) Review by counsel during trial

During trial, counsel must call the court's attention to any errors or omissions they may find in the transcripts. The court must periodically ask counsel for lists of any such errors or omissions and may hold hearings to verify them.

(b) Review by counsel after trial

When the clerk delivers the clerk's and reporter's transcripts to trial counsel, each counsel must promptly:

(1) Review the docket sheets and minute orders to determine whether the reporter's transcript is complete;

(2) Consult with opposing counsel to determine whether any other proceedings or discussions should have been transcribed; and

(3) Review the court file to determine whether the clerk's transcript is complete.

(c) Declaration and request for additions or corrections

(1) Within 30 days after the clerk delivers the transcripts, each trial counsel must serve and file a declaration stating that counsel or another person under counsel's supervision has performed the tasks required by (b), and must serve and file either:

(A) A request to include additional materials in the record or to correct errors that have come to counsel's attention, or

(B) A statement that counsel does not request any additions or corrections.

(2) A request for additions to the reporter's transcript must state the nature and date of the proceedings and, if known, the identity of the reporter who reported them.

(3) If any counsel fails to timely file a declaration under (1), the judge must not certify the record and must set the matter for hearing, require a showing of good cause why counsel has not complied, and fix a date for compliance.

(d) Completion of the record

If any counsel files a request for additions or corrections:

(1) The clerk must promptly deliver the original transcripts to the judge who presided at the trial.

(2) Within 15 days after the last request is filed, the judge must hold a hearing and order any necessary additions or corrections. The order must require that any additions or corrections be made within 10 days of its date.

(3) The clerk must promptly—and in any event within five days—notify the reporter of an order under (2). If any portion of the proceedings cannot be transcribed, the judge may order preparation of a settled statement under rule ~~32.3~~ 8.446.

(4) The original transcripts must be augmented or corrected to reflect all additions or corrections ordered. The clerk must promptly send copies of the additional or corrected pages to trial counsel.

(5) Within five days after the augmented or corrected transcripts are filed, the judge must set another hearing to determine whether the record has been completed or corrected as ordered. The judge may order further proceedings to complete or correct the record.

(6) When the judge is satisfied that all additions or corrections ordered have been made and copies of all additional or corrected pages have been sent to trial counsel, the judge must certify the record as complete and redeliver the original transcripts to the clerk.

(7) The judge must certify the record as complete within 90 days after the judgment of death is rendered.

(e) Computer-readable copies

(1) When the record is certified as complete, the clerk must promptly notify the reporter to prepare five computer-readable copies of the transcript and two additional computer-readable copies for each codefendant sentenced to death.

(2) Each computer-readable copy must comply with the format, labeling, content, and numbering requirements of Code of Civil Procedure section 271(b) and any additional requirements prescribed by the Supreme Court, and must be further labeled to show the date it was made.

(3) A computer-readable copy of a sealed transcript must be placed on a separate disk and clearly labeled as confidential.

(4) The reporter is to be compensated for computer-readable copies as provided in Government Code section 69954(b).

(5) Within 10 days after the clerk notifies the reporter under (1), the reporter must deliver the computer-readable copies to the clerk.

(f) Extension of time

(1) The court may extend for good cause any of the periods specified in this rule.

(2) An application to extend the 30-day period to review the record under (c) must be served and filed within that period. If the clerk's and reporter's transcripts combined exceed 10,000 pages, the court may grant an additional three days for each 1,000 pages over 10,000.

(3) If the court orders an extension of time, the order must specify the justification for the extension. The clerk must promptly send a copy of the order to the Supreme Court.

(g) Sending the certified record

When the record is certified as complete, the clerk must promptly send:

(1) To each defendant's appellate counsel and each defendant's habeas corpus counsel: one paper copy of the entire record and one computer-readable copy of the reporter's transcript. If either counsel has not been retained or

appointed, the clerk must keep that counsel's copies until counsel is retained or appointed.

(2) To the Attorney General, the Habeas Corpus Resource Center, and the California Appellate Project in San Francisco: one paper copy of the clerk's transcript and one computer-readable copy of the reporter's transcript.

(h) Notice of delivery

When the clerk sends the record to the defendant's appellate counsel, the clerk must serve a notice of delivery on the Supreme Court clerk.

Advisory Committee Comment [revised version]

Rule 8.519 implements Penal Code section 190.8(c)–(e).

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

~~Revised rule 35.1 is former rule 39.54 and~~Rule 8.519 implements Penal Code section 190.8(c)–(e).

~~**Subdivision (a).** Revised rule 35.1(a) restates Penal Code section 190.8(c); the wording is simplified, but no substantive change is intended.~~

~~**Subdivision (b).** As used in revised rule 35.1(b)—as in all rules in this part—trial counsel "means both the defendant's trial counsel and the prosecuting attorney." (Revised rule 34(e)(2).)~~

~~Revised rule 35.1(b)(2) fills a gap; it is derived from former rule 39.52(g)(4).~~

~~**Subdivision (c).** Revised rule 35.1(c)(1), like former rule 39.54(c)(1), requires counsel to file a declaration stating that counsel has performed the tasks required by the rule, i.e., has reviewed the record for completeness. Under the former rule, counsel who was satisfied with the state of the record—and therefore had determined not to request any additions—simply remained silent in regard to any such request, and the court was required to infer from that silence that counsel did not intend to make a request. In a substantive change designed to prevent any misunderstanding of counsel's intent on this important point, revised rule 35.1(c)(1)(B) requires counsel not intending to request corrections or additions to make a statement to that effect as part of the required declaration.~~

~~**Subdivision (e).** Former rule 39.54(f) required the reporter to prepare one additional computer-readable copy of the transcript for each codefendant sentenced to death. Revised rule 35.1(e)(1) requires two such copies: an additional copy is needed to comply with the further requirement of the rule that the clerk send a computer-readable copy to each codefendant's habeas corpus counsel (former rule 39.54(j)(1); revised rule 35.1(g)(1)).~~

~~Former rule 39.54(f) required computer-readable copies of the transcript to comply with Code of Civil Procedure section 269(c), and former rule 35(b), and the latter rule specified that such copies must be on "CD-ROM or 3.5-inch disks." Rather than enshrining any particular technology in these rules, however, revised rule 35.1(e)(2) simply states that computer-readable copies must comply with the statute (now~~

~~Code Civ. Proc., § 271(b)) and "any additional requirements prescribed by the Supreme Court." The change is not meant to be substantive, but to provide the flexibility necessary to ensure the record-preparation process remains current with evolving computer technology.~~

~~Revised rule 35.1(e)(4) restates a provision of former rule 35(b), second paragraph.~~

Rule 8.522. ~~35.2.~~ Certifying the trial record for accuracy

(a) Request for corrections or additions

(1) Within 90 days after the clerk delivers the record to defendant's appellate counsel, any party may serve and file a request for corrections or additions.

(2) A request for additions to the reporter's transcript must state the nature and date of the proceedings and, if known, the identity of the reporter who reported them.

(b) Correction of the record

(1) If any counsel files a request for corrections or additions, the procedures and time limits of rule ~~35.1~~ 8.519(d)(1)–(5) must be followed.

(2) When the judge is satisfied that all corrections or additions ordered have been made, the judge must certify the record as accurate and redeliver the record to the clerk.

(3) The judge must certify the record as accurate within 120 days after it is delivered to appellate counsel.

(c) Computer-readable copies

(1) When the record is certified as accurate, the clerk must promptly notify the reporter to prepare six computer-readable copies of the reporter's transcript and two additional computer-readable copies for each codefendant sentenced to death.

(2) In preparing the computer-readable copies, the procedures and time limits of rule ~~35.1~~ 8.519(e)(2)–(5) must be followed.

(d) Extension of time

(1) The court may extend for good cause any of the periods specified in this rule.

(2) An application to extend the 90-day period to request corrections or additions under (a) must be served and filed within that period. If the clerk's and reporter's transcripts combined exceed 10,000 pages, the court may grant an additional 15 days for each 1,000 pages over 10,000.

(3) If the court orders an extension of time, the order must specify the justification for the extension. The clerk must promptly send a copy of the order to the Supreme Court.

(4) If the court orders an extension of time, the court may conduct a status conference or require the counsel who requested the extension to file a status report on counsel's progress in reviewing the record.

(e) Sending the certified record

When the record is certified as accurate, the clerk must promptly send:

(1) To the Supreme Court: the corrected original record, including the judge's certificate of accuracy, and a computer-readable copy of the reporter's transcript.

(2) To each defendant's appellate counsel, each defendant's habeas corpus counsel, the Attorney General, the Habeas Corpus Resource Center, and the California Appellate Project in San Francisco: a copy of the order certifying the record and a computer-readable copy of the reporter's transcript.

(3) To the Governor: the copies of the transcripts required by Penal Code section 1218, with copies of any corrected or augmented pages inserted.

Advisory Committee Comment [revised version]

Rule 8.522 implements Penal Code section 190.8(g).

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

~~Revised rule 35.2 restates former rules 39.55 and 39.56 and~~Rule 8.522 implements Penal Code section 190.8(g).

~~**Subdivision (c).** Former rule 39.55(c) required the reporter to prepare one additional computer-readable copy of the transcript for each codefendant sentenced to death. Revised rule 35.2(c)(1) requires two such copies: an additional copy is needed to comply with the further requirement of the rule that the clerk send a computer-readable copy to each codefendant's habeas corpus counsel (former rule 39.56(3); revised rule 35.2(e)(2)).~~

~~The provisions of former rule 39.55(c) specifying the format of the computer-readable copies of the reporter's transcript now appear in revised rule 35.1(e).~~

~~**Subdivision (d).** Former rule 39.55(h) authorized the court, after granting an extension of time, to conduct a status conference or require defense counsel to file a status report "90 days after the delivery of the record to [counsel], or at some other reasonable time . . . ." Because it may be assumed the court will not fix an *unreasonable* time for this purpose, revised rule 35.2(d)(4) deletes the quoted provision as unnecessary. No substantive change is intended. And because an extension of time may be requested not only by defense counsel but also by counsel for the People, revised rule 35.2(d)(4) authorizes the court to require a status report simply from "the counsel who requested the extension . . . ."~~

~~**Subdivision (e).** Revised rule 35.2(e) is former rule 39.56. Former rule 39.56(2)–(3) directed the clerk, after the record was certified, to send the parties "a notice enumerating all corrections ordered and stating a date of certification," as well as copies of all the corrected transcript pages. Under revised rule 35.1(d)(4), however, the corrected pages are sent to the parties before certification, and to send a belated list of "all corrections ordered" would serve little purpose. Revised rule 35.2(e) therefore deletes these directives in favor of a copy of the certification order for the parties and a copy of the transcripts and corrected pages for the Governor.~~

Rule 8.525. ~~35.3.~~ Certifying the record in pre-1997 trials

(a) Application

This rule governs the process of certifying the record in any appeal from a judgment of death imposed after a trial that began before January 1, 1997.

(b) Sending the transcripts to counsel for review

(1) When the clerk and the reporter certify that their respective transcripts are correct, the clerk must promptly send a copy of each transcript to each defendant's trial counsel, to the Attorney General, to the district attorney, to the California Appellate Project in San Francisco, and to the Habeas Corpus Resource Center, noting the sending date on the originals.

(2) The copies of the reporter's transcript sent to the California Appellate Project and the Habeas Corpus Resource Center must be computer-readable copies complying with the format, labeling, content, and numbering requirements of Code of Civil Procedure section 271(b) and any additional requirements prescribed by the Supreme Court, and must be further labeled to show the date they were made.

(3) When the clerk is notified of the appointment or retention of each defendant's appellate counsel, the clerk must promptly send that counsel copies of the clerk's transcript and the reporter's transcript, noting the sending date on the originals. The clerk must notify the Supreme Court, the Attorney General, and

each defendant's appellate counsel in writing of the date the transcripts were sent to appellate counsel.

(c) Correcting, augmenting, and certifying the record

(1) Within 90 days after the clerk delivers the transcripts to each defendant's appellate counsel, any party may serve and file a request for correction or augmentation of the record. Any request for extension of time must be served and filed in the Supreme Court no later than five days before the 90-day period expires.

(2) If no party files a timely request for correction or augmentation, the clerk must certify on the original transcripts that no party objected to the accuracy or completeness of the record within the time allowed by law.

(3) Within 10 days after any party files a timely request for correction or augmentation, the clerk must deliver the request and the transcripts to the trial judge.

(4) Within 60 days after receiving a request and transcripts under (3), the judge must order the reporter, clerk, or party to make any necessary corrections or do any act necessary to complete the record, fixing the time for performance. If any portion of the oral proceedings cannot be transcribed, the judge may order preparation of a settled statement under rule ~~32.3~~ 8.446.

(5) The clerk must promptly send a copy of any order under (4) to the parties and to the Supreme Court, but any request for extension of time to comply with the order must be addressed to the trial judge.

(6) The original transcripts must be corrected or augmented to reflect all corrections or augmentations ordered. The clerk must promptly send copies of all corrected or augmented pages to the parties.

(7) The judge must allow the parties a reasonable time to review the corrections or augmentations. If no party objects to the corrections or augmentations as prepared, the judge must certify that the record is complete and accurate. If any party objects, the judge must resolve the objections before certifying the record.

(8) If the record is not certified within 90 days after the clerk sends the transcripts to appellate counsel under (b)(2), the judge must monitor preparation of the record to expedite certification and report the status of the record monthly to the Supreme Court.

(d) Sending the certified record

When the clerk certifies that no party objected to the record or the judge certifies that the record is complete and accurate, the clerk must promptly send:

(1) To the Supreme Court: the original record, including the original certification by the trial judge.

(2) To each defendant's appellate counsel, the Attorney General, and the California Appellate Project in San Francisco: a copy of the order certifying the record.

(3) To the Governor: the copies of the transcripts required by Penal Code section 1218, with copies of any corrected or augmented pages inserted.

(e) Subsequent trial court orders; omissions

(1) If, after the record is certified, the trial court amends or recalls the judgment or makes any other order in the case, including an order affecting the sentence, the clerk must promptly certify and send a copy of the amended abstract of judgment or other order—as an augmentation of the record—to the persons and entities listed in (d).

(2) If, after the record is certified, the superior court clerk or the reporter learns that the record omits a document or transcript that any rule or court order requires to be included, the clerk must promptly copy and certify the document or the reporter must promptly prepare and certify the transcript. Without the need for further court order, the clerk must send the document or transcript—as an augmentation of the record—to the persons and entities listed in (d).

~~**Advisory Committee Comment (2004)**~~

~~Revised rule 35.3 has limited application, as explained in subdivision (a). It restates portions of former rule 35 relating to death penalty appeals, supplemented by new provisions derived from former rules 39.52–39.55.~~

~~**Subdivision (b).** Revised rule 35.3(b) is based on former rule 35(b) and (c)(1)–(3). Filling a gap, revised rule 35.3(b)(1) and (2) require that the transcripts be sent to the Habeas Corpus Resource Center as well as the California Appellate Project. Both entities bear responsibilities in the postconviction process.~~

~~Former rule 35(b) specified that computer-readable copies of the transcript must be on "CD-ROM or 3.5-inch disks." Rather than enshrining any particular technology in these rules, however, revised rule~~

~~35.3(b)(2) simply states that computer-readable copies must comply with the relevant statute (Code Civ. Proc., § 271(b)) and "any additional requirements prescribed by the Supreme Court." The change is not meant to be substantive, but to provide the flexibility necessary to ensure the record-preparation process remains current with evolving computer technology. The date-labeling requirement is derived from former rules 39.52(i)(6) and 39.54(f).~~

~~**Subdivision (c).** Revised rule 35.3(c) is based on former rule 35(c)(4). The revised subdivision provides for augmentation of the record (in addition to correction), consistently with practice and with the law governing death penalty appeals in post-1996 cases (see Pen. Code, § 190.8(a) and former rule 39.54).~~

~~The second sentence of paragraph (1) of revised rule 35.3(c) is a substantive change intended to expedite record correction and facilitate Supreme Court supervision of the process.~~

~~The second sentence of paragraph (4) of revised rule 35.3(c) fills a gap and reflects current practice. Former rule 35(c)(4) also directed the court to determine which corrections had "sufficient potential significance" to require them to be furnished to the parties in the form of corrected pages, and directed that the corrections be made "by strikeover and interlineations where possible." The revised rule deletes these provisions as unnecessary micromanagement of the correction process and as inconsistent with the intent of the statutes and rules governing death penalty appeals in post-1996 cases.~~

~~Paragraph (5) of revised rule 35.3(c) is a substantive change intended to facilitate Supreme Court supervision of the process of record correction while preserving the trial court's discretion to extend time to comply with its orders.~~

~~Paragraphs (6) and (7) of revised rule 35.3(c) fill gaps in the correction process. They are derived from former rule 39.54(d)(3) and (4), respectively.~~

~~Paragraph (8) of revised rule 35.3(c) is derived from former Penal Code section 190.8 and is intended to facilitate Supreme Court supervision of the process of record correction.~~

~~**Subdivision (d).** Former rule 35(e) directed the clerk, after the record was certified, to send the parties "notices enumerating all corrections ordered and stating a date of certification," as well as copies of all the corrected transcript pages. Under revised rule 35.3(c)(6), however, the corrected pages are sent to the parties before certification, and to send a belated list of "all corrections ordered" would serve little purpose. Revised rule 35.3(d) therefore deletes these directives in favor of a copy of the certification order for the parties and a copy of the transcripts and corrected pages for the Governor.~~

~~**Subdivision (e).** Revised rule 35.3(e) is derived from the last two paragraphs of former rule 35(e).~~

~~**Former rule 35(e).** Former rule 35(e) also provided for the transmission of certain exhibits in criminal appeals. Revised rule 36.1 now governs the transmission of exhibits in death penalty appeals.~~

Article 3. Briefs, Hearing, and Decision

Rule 8.530. ~~36.~~ Briefs by parties and amici curiae

(a) Contents and form

Except as provided in this rule, briefs in appeals from judgments of death must comply as nearly as possible with rules ~~13~~ 8.200 and ~~14~~ 8.204.

(b) Length

(1) A brief produced on a computer must not exceed the following limits, including footnotes:

(A) Appellant's opening brief and respondent's brief: 95,200 words.

(B) Reply brief: 47,600 words.

(C) Petition for rehearing and answer: 23,800 words.

(2) A brief under (1) must include a certificate by appellate counsel stating the number of words in the brief; counsel may rely on the word count of the computer program used to prepare the brief.

(3) A typewritten brief must not exceed the following limits:

(A) Appellant's opening brief and respondent's brief: 280 pages.

(B) Reply brief: 140 pages.

(C) Petition for rehearing and answer: 70 pages.

(4) The tables, a certificate under (2), and any attachment permitted under rule ~~14~~ 8.204(d) are excluded from the limits stated in (1) or (3).

(5) On application, the Chief Justice may permit a longer brief for good cause.

(c) Time to file

(1) Except as provided in (2), the times to file briefs in an appeal from a judgment of death are as follows:

(A) The appellant's opening brief must be served and filed within 210 days after the record is certified as complete or the superior court clerk delivers the completed record to the defendant's appellate counsel, whichever is later. The Supreme Court clerk must promptly notify the defendant's appellate counsel and the Attorney General of the due date for the appellant's opening brief.

(B) The respondent's brief must be served and filed within 120 days after the appellant's opening brief is filed. The Supreme Court clerk must promptly notify the defendant's appellate counsel and the Attorney General of the due date for the respondent's brief.

(C) If the clerk's and reporter's transcripts combined exceed 10,000 pages, the time limits stated in (A) and (B) are extended by 15 days for each 1,000 pages of combined transcript over 10,000 pages.

(D) The appellant must serve and file a reply brief, if any, within 60 days after the respondent files its brief.

(2) In any appeal from a judgment of death imposed after a trial that began before January 1, 1997, the time to file briefs is governed by rule ~~33~~ 8.460(c).

(3) The Chief Justice may extend the time to serve and file a brief for good cause.

(d) Supplemental briefs

Supplemental briefs may be filed as provided in rule ~~29.1~~ 8.320(d).

(e) Amicus curiae briefs

Amicus curiae briefs may be filed as provided in rule ~~29.1~~ 8.320(f).

(f) Briefs on the court's request

The court may request additional briefs on any or all issues.

(g) Service

(1) The Supreme Court Policy on Service of Process by Counsel for Defendant governs service of the defendant's briefs.

(2) The Attorney General must serve two copies of the respondent's brief on each defendant's appellate counsel and, for each defendant sentenced to death, one copy on the California Appellate Project in San Francisco.

(3) A copy of each brief must be served on the superior court clerk for delivery to the trial judge.

(h) Judicial notice

To obtain judicial notice by the Supreme Court under Evidence Code section 459, a party must comply with rule ~~22~~ 8.252(a).

Advisory Committee Comment [revised version]

Subdivision (b). Subdivision (b)(1) states the maximum permissible lengths of briefs produced on a computer in terms of word count rather than page count. This provision tracks a provision in rule 8.204(c) governing Court of Appeal briefs and is explained in the comment to that provision. Each word count assumes a brief using one-and-one-half spaced lines of text, as permitted by rule 8.204(b)(5).

Subdivision (g). Subdivision (g)(1) is a cross-reference to Policy 4 of the Supreme Court Policies Regarding Cases Arising From Judgments of Death.

Advisory Committee Comment ~~(2004)~~ [version showing revisions]

~~Revised rule 36 is based primarily on former rules 37 and 39.57.~~

~~**Subdivision (a).** Revised rule 36(a) restates former rule 37(c).~~

Subdivision (b). ~~Revised rule 36~~Subdivision (b)(1) states the maximum permissible lengths of briefs produced on a computer in terms of word count rather than page count. This ~~substantive change~~ provision tracks a provision in ~~revised~~ rule ~~14~~ 8.204(c) governing Court of Appeal briefs~~,~~ and is explained in the comment to that provision. Each word count assumes a brief using one-and-one-half spaced lines of text, as permitted by rule ~~14~~ 8.204(b)(5).

~~Filling a gap, paragraphs (1)(C) and (3)(C) of revised rule 36(b) provide for the maximum permissible length of an answer to a petition for rehearing.~~

~~Filling a gap, revised rule 36(b)(4) provides that any attachment under rule 14(d) is to be excluded in calculating the length of a brief. The provision is derived from revised rule 14(c)(3).~~

~~**Subdivision (c).** Subdivision (c)(1) of revised rule 36 restates former rule 39.57; subdivision (c)(2) restates former rule 39.50(a) insofar as it applied to the time to file briefs.~~

~~Former rule 39.57(e) provided that the Supreme Court could extend the time to serve and file briefs for good cause, "in accordance with the policies and factors contained in rule 45.5, to the extent they are applicable." Revised rule 36(c)(3) recognizes that this power is vested in the Chief Justice (see rule 45(c)), and deletes the cross-reference to rule 45.5 as unnecessary. No substantive change is intended.~~

~~**Subdivisions (d) and (e).** Revised rule 36(d) and (e) are cross-reference provisions added to clarify the applicability of rule 29.1(d) and (f) to death penalty appeals.~~

~~**Subdivision (f).** Revised rule 36(f) fills a gap by recognizing the Supreme Court's practice of requesting supplemental briefs when necessary.~~

Subdivision (g). ~~Revised rule 36~~Subdivision (g)(1) is a cross-reference to Policy 4 of the Supreme Court Policies Regarding Cases Arising From Judgments of Death. ~~The requirement of revised rule 36(g)(2) that the Attorney General serve the California Appellate Project in San Francisco states current practice.~~

~~**Subdivision (h).** Revised rule 36(h) is a cross-reference provision added to clarify the applicability of rule 22(a) to death penalty appeals.~~

Rule 8.534. ~~36.1.~~ Transmitting exhibits; augmenting the record in the Supreme Court

(a) Application

Except as provided in ~~this rule~~ (b), rule ~~18~~ 8.224 governs the transmission of exhibits to the Supreme Court.

(b) Time to file notice of designation

No party may file a notice designating exhibits under rule ~~18~~ 8.224(a) until the Supreme Court clerk notifies the parties of the time and place of oral argument.

(c) Augmenting the record in the Supreme Court

At any time, on motion of a party or on its own motion, the Supreme Court may order the record augmented or corrected as provided in rule ~~12~~ 8.155.

~~**Advisory Committee Comment (2004)**~~

~~**Subdivision (c).** Revised rule 36.1(c) is new. It is not a substantive change, but is a cross-reference inserted in this rule to clarify the applicability of rule 12 to death penalty appeals.~~

~~**Advisory Committee Comment (2003)**~~

~~New rule 36.1(b) restates without change the first clause of former rule 10(d) insofar as it applies to death penalty appeals.~~

Rule 8.538. ~~36.2.~~ Oral argument and submission of the cause

(a) Application

Except as provided in ~~this rule~~ (b), rule ~~29.2~~ 8.324 governs oral argument and submission of the cause in the Supreme Court unless the court provides otherwise in its Internal Operating Practices and Procedures or by order.

(b) Procedure

(1) The appellant has the right to open and close.

(2) Each side is allowed 45 minutes for argument.

(3) Two counsel may argue on each side if, within 10 days after the date of the order setting the case for argument, they notify the court that the case requires it.

~~**Advisory Committee Comment (2004)**~~

~~**Subdivision (b).** Former rule 22(d) required counsel to notify the court not later than 10 days before "the date of the argument" if two counsel wanted to argue a death penalty appeal on each side; subdivision (b)(3) of revised rule 36.2 requires the same notice within 10 days after "the date of the order setting the case for argument." The purpose of the change is to coordinate this provision with the provision governing requests to divide oral argument among multiple counsel in noncapital appeals (rule 29.2(f)(2)). In most cases, however, the revised wording will yield a deadline identical to or no later than that resulting from the former wording, because of the provision requiring the clerk to give the parties at least 20 days' notice of the date of the argument (rule 29.2(c)).~~

~~**Advisory Committee Comment (2003)**~~

~~New rule 36.2(b) restates without change former rule 22 insofar as it applies to death penalty appeals.~~

Rule 8.542. ~~36.3.~~ Filing, finality, and modification of decision; rehearing; remittitur

Rules ~~29.4~~ 8.332 through ~~29.6~~ 8.340 govern the filing, finality, and modification of decision, rehearing, and issuance of remittitur by the Supreme Court in an appeal from a judgment of death.

~~**Advisory Committee Comment (2004)**~~

~~Revised rule 36.3 is new but is not a substantive change. It clarifies the applicability, to death penalty appeals, of the relevant rules governing the decision of civil appeals in the Supreme Court.~~

Chapter 5. Appeals and Writs in Habeas Corpus Cases

Rule 8.550. ~~60.~~ Petition for writ of habeas corpus filed by petitioner not represented by an attorney

(a) Required Judicial Council form

(1) A person who is not represented by an attorney and who petitions a reviewing court for writ of habeas corpus seeking release from, or modification of the conditions of, custody of a person confined in a state or local penal institution, hospital, narcotics treatment facility, or other institution must file the petition on Judicial Council form MC-275, *Petition for Writ of Habeas Corpus.* For

good cause the court may permit the filing of a petition that is not on form MC-275.

(2) A petition filed under (1) need not comply with the provisions of rules ~~14, 44, or 56~~ 8.204, 8.40, or 8.700 that prescribe the form and content of a petition and require the petition to be accompanied by a memorandum of points and authorities.

(3) In the Court of Appeal, the petitioner must file the original of the petition under (1) and 1 set of any supporting documents. In the Supreme Court, the petitioner must file an original and 10 copies of the petition and an original and 2 copies of any supporting document accompanying the petition unless the court orders otherwise.

(b) Record

Before ruling on the petition, the court may order the custodian of any relevant record to produce the record or a certified copy to be filed with the court.

(c) Informal response

(1) The court may request an informal written response from the respondent, the real party in interest, or an interested person. The court must send a copy of any request to the petitioner.

(2) The response must be served and filed within 15 days or as the court specifies.

(3) If a response is filed, the court must notify the petitioner that a reply may be served and filed within 15 days or as the court specifies. The court may not deny the petition until that time has expired.

(d) Petition filed in an inappropriate court

(1) A Court of Appeal may deny without prejudice a petition for writ of habeas corpus that is based primarily on facts occurring outside the court's appellate district, including petitions that question:

(A) The validity of judgments or orders of trial courts located outside the district, or

(B) The conditions of confinement or conduct of correctional officials outside the district.

(2) A Court of Appeal must deny without prejudice a petition for writ of habeas corpus that challenges the denial of parole or the petitioner's suitability for parole if the issue was not first adjudicated by the trial court that rendered the underlying judgment.

(3) If the court denies a petition solely under (1), the order must state the basis of the denial and must identify the appropriate court in which to file the petition.

Advisory Committee Comment ~~(2005)~~

Subdivision (d). Except for subdivision (d)(2), revised rule ~~60(d)~~ 8.550(d) restates former section 6.5 of the Standards of Judicial Administration. New subdivision (d)(2) is based on the California Supreme Court decision in *In re Roberts* (2005) 36 Cal.4th 575, which provides that petitions for writ of habeas corpus challenging denial or suitability for parole are first to be adjudicated in the trial court that rendered the underlying judgment.

~~Revised rule 60(a)–(b) restates former rule 56.5.~~

~~**Subdivision (b).** New subdivision (b)(5) of revised rule 60 is a substantive change intended to assist the reviewing courts in processing habeas corpus petitions filed by attorneys. It implements a recent amendment to rule 56(d)(1) that requires documents submitted in support of a writ petition to be continuously paginated and index-tabbed by number or letter.~~

~~New subdivision (b)(6) of revised rule 60 is a substantive change intended to assist the reviewing courts in determining the merits of any habeas corpus petition that was the subject of an evidentiary hearing in a lower court.~~

~~Subdivision (b)(7) of revised rule 60 is former rule 56.5(d), conformed to revised rule 56(d)(2).~~

~~**Subdivision (e).** Revised rule 60(e) restates section 6.5 of the Standards of Judicial Administration.~~

Rule 8.551. ~~60.5.~~ Petition for writ of habeas corpus filed by an attorney for a party

(a) General application of rule ~~60~~ 8.550

Except as provided in this rule, rule ~~60~~ 8.550 applies to any petition for a writ of habeas corpus filed by an attorney.

(b) Special requirements for a petition filed by an attorney

(1) A petition for habeas corpus filed by an attorney need not be filed on form MC-275, but must contain the information requested in that form and must comply with rules ~~14(a)–(b), 44 (c)–(d), and 56 (b)(6)~~ 8.204(a)–(b), 8.40 (b)–(c), and 8.700(b)(6).

(2) Any memorandum of points and authorities accompanying the petition must comply with rule ~~14~~ 8.204(a)–(b).

(3) The petition must be accompanied by a copy of any petition—excluding exhibits—pertaining to the same judgment and petitioner that was previously filed in any lower state court or any federal court. If such documents have previously been filed in the Supreme Court, the petition need only so state.

(4) If the petition asserts a claim that was the subject of an evidentiary hearing, the petition must be accompanied by a certified transcript of that hearing.

(5) Any supporting documents accompanying the petition must comply with rule ~~56~~ 8.700(d).

(6) The petition and any memorandum of points and authorities must support any reference to a matter in the supporting documents by a citation to its index tab and page.

(7) If the petition is filed in the Supreme Court, the attorney must file the number of copies of the petition and supporting documents required by rule ~~44(b)(1)~~ 8.44(a). If the petition is filed in the Court of Appeal, the attorney must file the number of copies of the petition required by rule ~~44(b)(2)~~ 8.44(b).

(8) The clerk must file an attorney's petition not complying with (1)–(7) if it otherwise complies with the rules of court, but the court may notify the attorney that it may strike the petition or impose a lesser sanction if the petition is not brought into compliance within a stated reasonable time of not less than five days.

Rule 8.555. ~~39.2.~~ Appeal from order granting relief by writ of habeas corpus

(a) Application

Except as otherwise provided in this rule, rules ~~30–33.3~~ 8.404–8.468 govern appeals under Penal Code section 1506 or 1507 from orders granting all or part of the relief sought in a petition for writ of habeas corpus.

(b) Contents of record

In an appeal under this rule, the record must contain:

(1) The petition, the return, and the traverse;

(2) The order to show cause;

(3) All court minutes;

(4) All documents and exhibits submitted to the court;

(5) The reporter's transcript of any oral proceedings;

(6) Any written opinion of the court;

(7) The order appealed from; and

(8) The notice of appeal.

~~**Advisory Committee Comment**~~

~~Revised rule 39.2 is former rule 50.~~

~~**Subdivision (b).** Paragraphs (2), (3), and (6) of revised rule 39.2(b) fill gaps; they are derived from revised rule 31(b)(3) and (7).~~

Chapter 6. Appeals and Writs in Juvenile Cases

Article 1. Appeals

Rule 8.600. ~~37.~~ Appeals in juvenile cases generally

(a) Application

Rules ~~37–38.6~~ 8.600–8.674 govern:

(1) Appeals from judgments or appealable orders in

(A) Dependency and delinquency cases under the Welfare and Institutions Code and

(B) Actions to free a child from parental custody and control under Family Code section 7800 et seq.; and

(2) Writ petitions under Welfare and Institutions Code sections 366.26 and 366.28.

(b) Confidentiality

(1) Except as provided in (3), the record on appeal and documents filed by the parties may be inspected only by reviewing court and appellate project personnel, the parties or their attorneys, and other persons the court may designate.

(2) To protect anonymity, a party must be referred to by first name and last initial in all filed documents and court orders and opinions; but if the first name is unusual or other circumstances would defeat the objective of anonymity, the party's initials may be used.

(3) Filed documents that protect anonymity as required by (2) may be inspected by any person or entity that is considering filing an amicus curiae brief.

(4) The court may limit or prohibit public admittance to oral argument.

(c) Notice of appeal

(1) To appeal from a judgment or appealable order under these rules, the appellant must file a notice of appeal in the superior court. The appellant or the appellant's attorney must sign the notice.

(2) The notice of appeal must be liberally construed, and is sufficient if it identifies the particular judgment or order being appealed. The notice need not specify the court to which the appeal is taken; the appeal will be treated as taken to the Court of Appeal for the district in which the superior court is located.

(d) Time to appeal

(1) Except as provided in (2) and (3), a notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed. Except as provided in rule ~~45.1~~ 8.66, no court may extend the time to file a notice of appeal.

(2) In matters heard by a referee not acting as a temporary judge, a notice of appeal must be filed within 60 days after the referee's order becomes final under rule ~~1417~~ 5.540(c).

(3) When an application for rehearing of an order of a referee not acting as a temporary judge is denied under rule ~~1418~~ 5.542, a notice of appeal from the referee's order must be filed within 60 days after that order is served under

rule ~~1416~~ 5.538(b)(3) or 30 days after entry of the order denying rehearing, whichever is later.

(4) If an appellant timely appeals from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is extended until 20 days after the superior court clerk mails notification of the first appeal.

(e) Receipt by mail from custodial institution

If the superior court clerk receives a notice of appeal by mail from a custodial institution after the period specified in (d) has expired but the envelope shows that the notice was mailed or delivered to custodial officials for mailing within the period specified in (d), the notice is deemed timely. The clerk must retain in the case file the envelope in which the notice was received.

(f) Premature or late notice of appeal

(1) A notice of appeal is premature if filed before the judgment is rendered or the order is made, but the reviewing court may treat the notice as filed immediately after the rendition of judgment or the making of the order.

(2) The superior court clerk must mark a late notice of appeal "Received [date] but not filed," notify the party that the notice was not filed because it was late, and send a copy of the marked notice of appeal to the district appellate project.

(g) Superior court clerk's duties

(1) When a notice of appeal is filed, the superior court clerk must immediately:

(A) Mail a notification of the filing to each party—including the minor—other than the appellant, to all attorneys of record, and to the reviewing court clerk, and

(B) Notify the reporter by telephone and in writing to prepare a reporter's transcript and deliver it to the clerk within 20 days after the notice of appeal is filed.

(2) The clerk must immediately mail a notification of the filing to any de facto parent, any Court Appointed Special Advocate, and any Indian tribe that has appeared in the proceedings.

(3) The notification must show the name of the appellant, the date it was mailed, the number and title of the case, and the date the notice of appeal was filed. If the information is available, the notification must also include:

(A) The name, address, telephone number, and California State Bar number of each attorney of record in the case;

(B) The name of the party that each attorney represented in the superior court; and

(C) The name, address, and telephone number of any unrepresented party.

(4) The notification to the reviewing court clerk must also include a copy of the notice of appeal and any sequential list of reporters made under rule ~~980.4~~ 2.950.

(5) A copy of the notice of appeal is sufficient notification if the required information is on the copy or is added by the superior court clerk.

(6) The mailing of a notification is a sufficient performance of the clerk's duty despite the discharge, disqualification, suspension, disbarment, or death of the attorney.

(7) Failure to comply with any provision of this subdivision does not affect the validity of the notice of appeal.

~~**Advisory Committee Comment**~~

~~Revised rule 37 principally restates subdivisions (a)–(b) and (e)–(g) of former rule 39.~~

~~**Subdivision (a).** Revised rule 37(a)(2) fills a gap by specifying that the rules in this part also apply to certain writ petitions under the Welfare and Institutions Code.~~

~~**Subdivision (b).** Revised rule 37(b) is former rule 39(f)–(g). In a substantive change, revised rule 37(b)(1) authorizes appellate project personnel to inspect the record on appeal and documents filed by the parties. Appellate project personnel may need access to these documents in order to discharge their duties in juvenile cases.~~

~~Former rule 39 was silent on the question of how to preserve the anonymity of parties to juvenile appeals. The practice, however, is to do so by referring to a party by first name and last initial unless it would defeat the objective of anonymity, in which case the party's initials alone may be used. (See *California Style Manual* (4th ed. 2000) §§ 5:9, 5:10, 6:18.) Revised rule 37(b)(2) follows this practice.~~

~~Filling a gap, revised rule 37(b)(3) authorizes any person or entity that is considering filing an amicus curiae brief to inspect filed documents that protect the anonymity of the parties as required by revised rule~~

~~37(b)(2). A potential amicus curiae's need for this access is underscored by the requirement that an application for permission to file an amicus curiae brief explain how the proposed brief "will assist the court in deciding the matter." (Rules 13(c)(2), 29.1(f)(3).) The change is substantive.~~

~~**Subdivision (c).** Revised rule 37(c) is derived from rule 30(a).~~

~~**Subdivision (d).** Filling a gap, revised rule 37(d)(4) provides for the time to file a cross-appeal. (See rule 3(e)(1).)~~

~~**Subdivision (e).** Revised rule 37(e) is derived from rule 30.1(b)–(c).~~

~~**Subdivision (f).** The requirement of revised rule 37(f)(1) that the superior court clerk notify the affected minor of the filing of the notice of appeal is derived from former rule 39.1B(f) (now revised rule 38(f)); the requirement that the clerk notify the reviewing court and the reporter is derived from rule 30(c)(1).~~

~~The requirement of revised rule 37(f)(1)(B) that the clerk notify the reporter not only in writing but also by telephone is derived from former rule 39.1A(c) (now revised rule 38(g)(1)). It implements the Legislature's intent that appeals in dependency and delinquency cases be treated expeditiously. (See, e.g., Welf. & Inst. Code, §§ 395, 800 [such appeals must be given precedence "over all other cases"].)~~

~~Former rule 39(b) limited to *dependency* cases the requirement that the clerk mail a notification of the filing of a notice of appeal to "any defendant facto parent, any court-appointed special advocate, and . . . the tribe of an Indian child." Because such parents, advocates, or tribes may also be involved in delinquency cases, revised rule 37(f)(2) deletes the limitation. And because the interest of a tribe does not necessarily coincide with that of one of its members, the revised subdivision requires that the clerk notify only a tribe "that has appeared in the proceedings." These are substantive changes.~~

~~Revised rule 37(f)(3) requires the clerk to include the name of the appellant in a notification of the filing of a notice of appeal. This substantive change facilitates early settlement discussions in multiparty cases. The remainder of revised rule 37(f)(3)–(7) is derived from rule 30(c)(2)–(6).~~

~~**Former subdivision (e).** Former rule 39(e) is deleted as unnecessary; it restated existing statutory provisions giving juvenile appeals precedence (Welf. & Inst. Code, §§ 395, 800) and was primarily directed to the reviewing courts.~~

Rule <u>8.604.</u> ~~37.1.~~ Record on appeal

(a) Normal record: clerk's transcript

The clerk's transcript must contain:

(1) <u>T</u>he petition;

(2) <u>A</u>ny notice of hearing;

(3) <u>A</u>ll court minutes;

(4) Any report or other document submitted to the court;

(5) The jurisdictional findings;

(6) The judgment or order appealed from;

(7) Any application for rehearing;

(8) The notice of appeal and any order pursuant to the notice;

(9) Any transcript of a sound or sound-and-video recording tendered to the court under rule ~~243.9~~ 2.1040;

(10) Any application for additional record and any order on the application; and

(11) Any opinion or dispositive order of a reviewing court in the same case.

(b) Normal record: reporter's transcript

The reporter's transcript must contain:

(1) Except as provided in (2), the oral proceedings at any hearing that resulted in the order or judgment being appealed;

(2) In appeals from dispositional orders, the oral proceedings at hearings on

(A) Jurisdiction and disposition and

(B) Any motion by the appellant that was denied in whole or in part; and

(3) Any oral opinion of the court.

(c) Application in superior court for addition to normal record

(1) Any party may apply to the superior court for inclusion in the record of any of the following items:

(A) In the clerk's transcript: any written motion or notice of motion by any party, with supporting and opposing memoranda and attachments, and any written opinion of the court; and

(B) In the reporter's transcript: the oral proceedings on any prehearing motions.

(2) The application and order are governed by rule ~~31.1~~ 8.424(c)–(d).

(d) Agreed or settled statement

To proceed by agreed or settled statement, the parties must comply with rule ~~32.2~~ 8.444 or ~~32.3~~ 8.446, as applicable.

(e) Form of record

Except in cases governed by rule ~~37.4~~ 8.616(b), the clerk's and reporter's transcripts must comply with rule ~~9~~ 8.144.

(f) Transmitting exhibits

Exhibits that were admitted in evidence, refused, or lodged may be transmitted to the reviewing court as provided in rule ~~18~~ 8.224.

Advisory Committee Comment [revised version]

Subdivision (b). Subdivision (b)(1) provides that only the reporter's transcript of a hearing that resulted in the order being appealed must be included in the normal record. This provision is intended to achieve consistent record requirements in all juvenile appeals and to reduce the delays and expense caused by transcribing proceedings not necessary to the appeal.

Subdivision (b)(2)(A) recognizes that findings made in a jurisdictional hearing are not separately appealable and can be challenged only in an appeal from the ensuing dispositional order. The rule therefore specifically provides that a reporter's transcript of jurisdictional proceedings must be included in the normal record on appeal from a dispositional order.

Subdivision (b)(2)(B) specifies that the oral proceedings on any motion by the appellant that was denied in whole or in part must be included in the normal record on appeal from a disposition order. Rulings on such motions usually have some impact on either the jurisdictional findings or the subsequent disposition order. Routine inclusion of these proceedings in the record will promote expeditious resolution of juvenile appeals.

Advisory Committee Comment [version showing revisions]

~~Revised rule 37.1 principally restates former rule 39(c)–(d).~~

~~**Subdivision (a).** Former rule 39(c)(1) declared that the normal clerk's transcript on appeal included "any notice of hearing *addressed to the minor, the parent, or guardian*." Revised rule 37.1(a)(2) deletes the italicized qualification because it made the designation underinclusive: it excluded, for example, a notice of hearing given under the federal Indian Child Welfare Act, which must also be included in the clerk's transcript.~~

~~Revised rule 37.1(a)(4) combines and simplifies the provisions of former rule 39.1A(c)(4)–(5). Under the former rules, the required components of the clerk's transcript in an appeal from an order terminating parental rights differed from the required components of the clerk's transcript in every other juvenile appeal. Revised rule 37.1(a)(4) requires that the same clerk's transcript be prepared in all juvenile appeals. This substantive change is intended to eliminate any possible confusion or delays caused by the inconsistent record requirements of the former rules.~~

~~Revised rule 37.1(a)(9) is derived from rule 31(b)(11).~~

~~Revised rule 37.1(a)(10) is derived from rule 31(b)(12).~~

~~Revised rule 37.1(a)(11) fills an important gap. An earlier opinion of the reviewing court in the same case should be part of the record on appeal.~~

~~**Subdivision (b).** Former rule 39(c)(2) required that the normal record include reporter's transcripts of all hearings in a juvenile case except the detention hearing, regardless of which order was being appealed. Former rule 39.1A(c)(1), however, provided that in appeals from orders terminating parental rights the normal record must include reporter's transcripts of only those portions of the hearing from which the appeal was taken. Revised rule 37.1~~ Subdivision (b)(1) ~~essentially adopts the position of former rule 39.1A(c)(1) and establishes the general rule~~provides that only the reporter's transcript of a hearing that resulted in the order being appealed must be included in the normal record. This ~~substantive change~~ provision is intended to achieve consistent record requirements in all juvenile appeals and to reduce the delays and expense caused by transcribing proceedings not necessary to the appeal.

~~Revised rule 37.1~~Subdivision (b)(2)(A) recognizes that findings made in a jurisdictional hearing are not separately appealable and can be challenged only in an appeal from the ensuing dispositional order. The ~~revised~~ rule therefore specifically provides that a reporter's transcript of jurisdictional proceedings must be included in the normal record on appeal from a dispositional order.

~~Revised rule 37.1~~Subdivision (b)(2)(B) specifies that the oral proceedings on any motion by the appellant that was denied in whole or in part must be included in the normal record on appeal from a disposition order. Rulings on such motions usually have some impact on either the jurisdictional findings or the subsequent disposition order. ~~Former rule 39(d) permitted a party to request inclusion of these proceedings in the reporter's transcript, but the need to seek augmentation often caused delays in the preparation of the record.~~ Routine inclusion of these proceedings in the record will promote expeditious resolution of juvenile appeals. ~~This is a substantive change.~~

~~Former rule 39(c)(2) required the reporter's transcript to include the oral proceedings in the trial court, "excluding opening statements." Because such statements are often combined with evidentiary requests and rulings, the requirement is difficult for reporters to meet; revised rule 37.1(b) deletes it in the interest of efficiency. The change is substantive.~~

~~**Subdivisions (d) and (e).** Revised rule 37.1(d)–(e) fills gaps consistently with practice.~~

~~**Subdivision (f).** Revised rule 37.1(f) restates provisions of former rule 39(c)(3) and (d)(3); it is derived from rule 33.1.~~

Rule 8.608. ~~37. 2.~~ Preparing, sending, augmenting, and correcting the record

(a) Application

Except as provided in (b), this rule does not apply to cases under rule ~~37.4~~ 8.616.

(b) Preparing and certifying the transcripts

Within 20 days after the notice of appeal is filed:

(1) The clerk must prepare and certify as correct an original of the clerk's transcript and sufficient copies to comply with (d), and

(2) The reporter must prepare, certify as correct, and deliver to the clerk an original of the reporter's transcript and the same number of copies as (1) requires of the clerk's transcript.

(c) Extension of time

(1) The superior court may not extend the time to prepare the record.

(2) The reviewing court may order one or more extensions of time, not exceeding a total of 60 days, on receipt of:

(A) An affidavit showing good cause, and

(B) In the case of a reporter's transcript, certification by the superior court presiding judge, or a court administrator designated by the presiding judge, that an extension is reasonable and necessary in light of the workload of all reporters in the court.

(d) Sending the record

(1) When the transcripts are certified as correct, the superior court clerk must immediately send:

(A) The original transcripts to the reviewing court, noting the sending date on each original, and

(B) One copy of each transcript to the appellate counsel for the appellant, the respondent, and the minor.

(2) If appellate counsel has not yet been retained or appointed when the transcripts are certified as correct, the clerk must send that counsel's copy of the transcripts to the district appellate project.

(3) The clerk must not send a copy of the transcripts to the Attorney General or the district attorney unless that office represents a party.

(e) Augmenting and correcting the record in the reviewing court

(1) Rule ~~32.1~~ 8.440(a)–(b) governs augmentation of the record without court order.

(2) On request of a party or on its own motion, the reviewing court may order the record augmented or corrected as provided in rule ~~12~~ 8.155(a) and (c).

Advisory Committee Comment [revised version]

Subdivision (a). Subdivision (a) calls litigants' attention to the fact that a different rule (rule 8.616) governs *sending, augmenting, and correcting* the record in appeals from judgments or orders terminating parental rights and in dependency appeals in certain counties. Rule 8.608(b) governs *preparing and certifying* the record in those appeals. (See rule 8.616(a)(2) ["In all respects not provided for in this rule, rules 8.600–8.612 apply"].)

Advisory Committee Comment [version showing revisions]

~~New rule 37.2 fills a number of gaps. It is derived from former rule 39.1A and the rules governing appeals from the superior court in criminal cases (rules 30–33.2).~~

Subdivision (a). ~~New rule 37.2~~Subdivision (a) calls litigants' attention to the fact that a different rule (~~revised~~ rule ~~37.4~~ 8.616) governs *sending, augmenting, and correcting* the record in appeals from judgments or orders terminating parental rights and in dependency appeals in certain counties. ~~New r~~Rule ~~37.2~~ 8.608(b) governs *preparing and certifying* the record in those appeals. (See ~~revised~~ rule ~~37.4~~ 8.616(a)(2) ["In all respects not provided for in this rule, rules ~~37–37.3~~ 8.600–8.612 apply~~.~~"].)

~~**Subdivision (b).** New rule 37.2(b) requires the record to be prepared within 20 days after the notice of appeal is filed. The requirement is based on former rule 39.1A(c).~~

~~**Subdivision (c).** As provided in criminal appeals by rule 32(e)(2), new rule 37.2(c) limits extensions of time to prepare the record to a total of 60 days and, to support an order of the reviewing court extending the time to prepare a reporter's transcript, requires that the superior court presiding judge or court administrator certify that the extension is reasonable and necessary in light of the workload of all reporters in the court.~~

~~**Subdivision (d).** As provided in criminal appeals by rule 32(f)(2), new rule 37.2(d)(1)(A) requires the clerk to note, on the originals of the clerk's and reporter's transcripts, the date they were sent to the reviewing court.~~

~~New rule 37.2(d)(2) fills a gap and reflects current practice (see also rules 31.2(a)(3)(B) and 32(f)(2)).~~

~~New rule 37.2(d)(3) is former rule 39.1(c).~~

~~**Subdivision (e).** New rule 37.2(e) is derived from rule 32.1 and former rule 39.1A(d).~~

Rule 8.612. ~~37.3.~~ Briefs by parties and amici curiae

(a) Contents, form, and length

Rule ~~33~~ 8.460(a)–(b) governs the contents, form, and length of briefs.

(b) Time to file

(1) Except in cases governed by rule ~~37.4~~ 8.616(e), the appellant must serve and file the appellant's opening brief within 40 days after the record is filed in the reviewing court.

(2) The respondent must serve and file the respondent's brief within 30 days after the appellant's opening brief is filed.

(3) The appellant must serve and file any reply brief within 20 days after the respondent's brief is filed.

(4) In dependency cases in which the minor is not an appellant but has appellate counsel, the minor must serve and file any brief within 10 days after the respondent's brief is filed.

(5) Rule ~~17~~ 8.220 applies if a party fails to timely file an appellant's opening brief or a respondent's brief, but the period specified in the notice required by that rule must be 30 days.

(c) Extensions of time

The superior court may not order any extensions of time to file briefs. Except in cases governed by rule ~~37.4~~ 8.616(f), the reviewing court may order extensions of time for good cause.

(d) Additional service requirements

(1) A copy of each brief must be served on the superior court clerk for delivery to the superior court judge.

(2) If the Court of Appeal has appointed counsel for any party:

(A) The county child welfare department and the People must serve two copies of their briefs on that counsel, and

(B) Each party must serve a copy of its brief on the district appellate project.

(3) In delinquency cases the parties must serve copies of their briefs on the Attorney General and the district attorney. In all other cases the parties must not serve copies of their briefs on the Attorney General or the district attorney unless that office represents a party.

(4) The parties must not serve copies of their briefs on the Supreme Court under rule ~~44(b)(2)(A)~~ 8.44(b)(1).

Advisory Committee Comment [revised version]

Subdivision (b). Subdivision (b)(1) calls litigants' attention to the fact that a different rule (rule 8.616(e)) governs the time to file an appellant's opening brief in appeals from judgments or orders terminating parental rights and in dependency appeals in certain counties.

Subdivision (c). Subdivision (c) calls litigants' attention to the fact that a different rule (rule 8.616(f)) governs the showing required for extensions of time to file briefs in appeals from judgments or orders terminating parental rights and in dependency appeals in certain counties.

Advisory Committee Comment [version showing revisions]

~~New rule 37.3 fills a gap. It is derived from former rule 39.1A(g) and the rules governing appeals from the superior court in criminal cases (rules 30–33.2).~~

Subdivision (b). ~~New rule 37.3~~Subdivision (b)(1) calls litigants' attention to the fact that a different rule (~~revised~~ rule ~~37.4~~ 8.616(e)) governs the time to file an appellant's opening brief in appeals from judgments or orders terminating parental rights and in dependency appeals in certain counties.

~~Former rule 39 did not provide for briefs by minors represented by counsel or for replies to such briefs; former rule 39.1A(g) provided for a minor's brief in an appeal from a judgment terminating parental rights but did not provide for a reply to the minor's brief, and effectively excluded the latter by requiring the appellant's reply brief to be served and filed at the same time as the minor's brief. These provisions often required the reviewing courts to extend time in cases in which they appointed counsel for the minor, resulting in different filing requirements for such briefs in different reviewing courts. For the purpose of remedying these inadequacies, new rule 37.3(b)(4) provides that a minor who is not the appellant but has appellate counsel must file any brief within 10 days after the respondent's brief is filed. The 10-day period is derived from former rule 39.2A(f); it is believed adequate because in most cases in which the minor needs separate counsel, any brief by the minor in effect responds to (or supports) the opening brief. Because the appellant must file any reply brief within 20 days after the respondent's brief is filed (new rule 37.3(b)(3)), the appellant has the opportunity to reply to both the respondent's brief and any minor's brief in the same document. The changes are substantive.~~

Subdivision (c). ~~New rule 37.3~~Subdivision (c) calls litigants' attention to the fact that a different rule (~~revised~~ rule ~~37.4~~ 8.616(f)) governs the showing required for extensions of time to file briefs in appeals from judgments or orders terminating parental rights and in dependency appeals in certain counties.

~~**Subdivision (d).** New rule 37.3(d)(2) is derived from former rule 39.1(d) and is made consistent with the rule on the number of copies of their briefs the People are required to serve in criminal cases (rule 33(d)(3)).~~

~~New rule 37.3(d)(3) is derived from rule 33(d)(1) and former rule 39.1(d).~~

~~New rule 37.3(d)(4) is derived from former rule 39.1(e).~~

Rule 8.616. ~~37.4.~~ Appeals from all terminations of parental rights; dependency appeals in Orange, Imperial, and San Diego Counties

(a) Application

(1) This rule governs:

(A) Appeals from judgments or appealable orders of all superior courts terminating parental rights under Welfare and Institutions Code 366.26 or freeing a child from parental custody and control under Family Code section 7800 et seq., and

(B) Appeals from judgments or appealable orders of the Superior Courts of Orange, Imperial, and San Diego Counties in all juvenile dependency cases.

(2) In all respects not provided for in this rule, rules ~~37–37.3~~ 8.600–8.612 apply.

(b) Cover of record

(1) In appeals under (a)(1)(A), the cover of the record must prominently display the title "Appeal From [Judgment or Order] Terminating Parental Rights Under [Welfare and Institutions Code Section 366.26 or Family Code Section 7800 et seq.]," whichever is appropriate.

(2) In appeals from judgments or appealable orders of the Superior Courts of Orange, Imperial, and San Diego Counties, the cover of the record must prominently display the title "Appeal From [Judgment or Order] Under [Welfare and Institutions Code Section 300 et seq. or Family Code Section 7800 et seq.]," whichever is appropriate.

(c) Sending the record

(1) When the clerk's and reporter's transcripts are certified as correct, the clerk must immediately send:

(A) The original transcripts to the reviewing court by the most expeditious method, noting the sending date on each original, and

(B) One copy of each transcript to the attorneys of record for the appellant, the respondent, and the minor, and to the district appellate project, by any method as fast as United States Postal Service express mail.

(2) If appellate counsel has not yet been retained or appointed when the transcripts are certified as correct, the clerk must send that counsel's copies of the transcripts to the district appellate project.

(d) Augmenting or correcting the record in the reviewing court

(1) Except as provided in (2) and (3), rule ~~12~~ 8.155 governs any augmentation or correction of the record.

(2) An appellant must serve and file any request for augmentation or correction within 15 days after receiving the record. A respondent must serve and file any such request within 15 days after the appellant's opening brief is filed.

(3) The clerk and the reporter must prepare any supplemental transcripts within 20 days, giving them the highest priority.

(4) The clerk must certify and send any supplemental transcripts as required by (c).

(e) Time to file appellant's opening brief

To permit determination of the appeal within 250 days after the notice of appeal is filed, the appellant must serve and file the appellant's opening brief within 30 days after the record is filed in the reviewing court.

(f) Extensions of time

The superior court may not order any extensions of time to prepare the record or to file briefs; the reviewing court may order extensions of time, but must require an exceptional showing of good cause.

(g) Oral argument and submission of the cause

(1) Unless the reviewing court orders otherwise, counsel must serve and file any request for oral argument no later than 15 days after the appellant's reply brief is filed or due to be filed. Failure to file a timely request will be deemed a waiver.

(2) The court must hear oral argument within 60 days after the appellant's last reply brief is filed or due to be filed, unless the court extends the time for good cause or counsel waive argument.

(3) If counsel waive argument, the cause is deemed submitted no later than 60 days after the appellant's reply brief is filed or due to be filed.

Advisory Committee Comment [revised version]

Subdivision (g). Subdivision (g)(1) recognizes certain reviewing courts' practice of requiring counsel to file any request for oral argument within a time period other than 15 days after the appellant's reply brief is filed or due to be filed. The reviewing court is still expected to determine the appeal "within 250 days after the notice of appeal is filed." (*Id.*, subd. (e).)

Advisory Committee Comment [version showing revisions]

~~Revised rule 37.4 combines former rules 39.1A, 39.2, and 39.2A, but deletes all provisions of those rules that expressly or in effect duplicated revised rules 37–37.3. Subdivisions (b) and (e) of former rule 39.1A were deleted because they expressly or in effect duplicated provisions of Welfare and Institutions Code section 366.26(*l*). No substantive change is intended.~~

~~**Subdivision (e).** Revised rule 37.3(b)(5) provides that "Rule 17 applies if a party fails to timely file an appellant's opening brief or a respondent's brief, but the period specified in the notice required by that rule must be 30 days." Revised rule 37.4(a)(2) makes the quoted provision applicable to all appeals governed by revised rule 37.4(e).~~

Subdivision (g). ~~Revised rule 37.4~~Subdivision (g)(1) recognizes certain reviewing courts' practice of requiring counsel to file any request for oral argument within a time period other than 15 days after the appellant's reply brief is filed or due to be filed. ~~It is not a substantive change.~~ The reviewing court is still expected to determine the appeal "within 250 days after the notice of appeal is filed." (*Id.*, subd. (e).)

Article 2. Writs

Rule 8.650. ~~38.~~ Notice of intent to file writ petition to review order setting hearing under Welfare and Institutions Code section 366.26

(a) Application

Rules ~~38–38.1~~ 8.650–8.652 and ~~1436.5~~ 5.600 govern writ petitions to review orders setting a hearing under Welfare and Institutions Code section 366.26. Rule ~~56~~ 8.700 does not apply to petitions governed by these rules.

(b) Purpose

Rules ~~38–38.1~~ 8.650–8.652 are intended to encourage and assist the reviewing courts to determine on their merits all writ petitions filed under these rules within the 120-day period for holding a hearing under Welfare and Institutions Code section 366.26.

(c) Who may file

The petitioner's trial counsel—or, if the petitioner was not represented by counsel at the hearing at which the section 366.26 hearing was set, the petitioner—is responsible for filing any notice of intent and writ petition under rules ~~38–38.1~~ 8.650–8.652. Trial counsel is encouraged to seek assistance from or consult with attorneys experienced in writ procedure.

(d) Extensions of time

The superior court may not extend any time period prescribed by rules ~~38–38.1~~ 8.650–8.652. The reviewing court may extend any time period, but must require an exceptional showing of good cause.

(e) Notice of intent

(1) A party seeking writ review under rules ~~38–38.1~~ 8.650–8.652 must file a notice of intent to file a writ petition and a request for the record.

(2) The notice must include all known dates of the hearing that resulted in the order under review.

(3) The notice must be signed by the party intending to file the petition or, if filed on behalf of the minor, by the attorney of record for the minor. The reviewing court may waive this requirement for good cause on the basis of a declaration by the attorney of record explaining why the party could not sign the notice.

(4) The notice must be filed within seven days after the date of the order setting the hearing or, if the order was made by a referee not acting as a temporary judge, within seven days after the referee's order becomes final under rule ~~1417~~ 5.540(c). The date of the order setting the hearing is the date on which

the court states the order on the record orally or in writing, whichever occurs first.

(5) If the party was notified of the order setting the hearing only by mail, the notice of intent must be filed within 12 days after the date that the clerk mailed the notification.

(f) Sending the notice of intent

(1) When the notice of intent is filed, the superior court clerks must immediately mail a copy of the notice to:

(A) Each counsel of record;

(B) Each party, including the child, if the child is 10 years of age or older; the mother; the father; the presumed and alleged parents; the present custodian of a dependent child's present caregiver; any legal guardian; and any person who has been declared a de facto parent and given standing to participate in the juvenile court proceedings;

(C) The probation officer or social worker;

(D) Any Court Appointed Special Advocate;

(E) The grandparents of the child, if their address is known and if the parents' whereabouts are unknown; and

(F) The Indian custodian and tribe of the child or the Bureau of Indian Affairs if the identify or location of the parent or Indian custodian and the tribe cannot be determined.

(2) The clerk must promptly send a copy of the notice of intent and a proof of service list to the reviewing court, by first-class mail or facsimile. If the party was notified of the order setting the hearing only by mail, the clerk must include the date that the notification was mailed.

(g) Preparing the record

When the notice of intent is filed, the superior court clerk must:

(1) Immediately notify the reporter by telephone and in writing to prepare a reporter's transcript of the oral proceedings at the hearing that resulted in the

order under review and deliver the transcript to the clerk within 12 calendar days after the notice of intent is filed; and

(2) Within 20 days after the notice of intent is filed, prepare a clerk's transcript that includes the notice of intent, proof of service, and all items listed in rule ~~37.1~~ 8.604(a).

(h) Sending the record

When the transcripts are certified as correct, the superior court clerk must immediately send:

(1) The original transcripts to the reviewing court by the most expeditious method, noting the sending date on each original, and

(2) One copy of each transcript to each counsel of record and any unrepresented party by any means as fast as United States Postal Service express mail.

(i) Reviewing court clerk's duties

(1) The reviewing court clerk must immediately lodge the notice of intent. When the notice is lodged, the reviewing court has jurisdiction of the writ proceedings.

(2) When the record is filed in the reviewing court, that court's clerk must immediately notify the parties, stating the date on which the 10-day period for filing the writ petition under rule ~~38.1~~ 8.652(c)(1) will expire.

Advisory Committee Comment [revised version]

Subdivision (d). The case law generally recognizes that the reviewing courts may grant extensions of time under these rules for exceptional good cause. (See, e.g., *Jonathan M. v. Superior Court* (1995) 39 Cal.App.4th 1826, and *In re Cathina W.* (1998) 68 Cal.App.4th 716 [recognizing that a late notice of intent may be filed on a showing of exceptional circumstances not under the petitioner's control].)

Advisory Committee Comment [version showing revisions]

~~Revised rule 38 restates the portions of former rule 39.1B that provided for a *notice of intent* to file a writ petition to review an order setting a hearing under Welfare and Institutions Code section 366.26. The portions of the former rule that provided for the petition itself are restated in revised rule 38.1.~~

Subdivision (d). ~~Revised rule 38(d) is new.~~ The case law generally recognizes that the reviewing courts may grant extensions of time under these rules for exceptional good cause. (See, e.g., *Jonathan M. v. Superior Court* (1995) 39 Cal.App.4th 1826, and *In re Cathina W.* (1998) 68 Cal.App.4th 716

[recognizing that a late notice of intent may be filed on a showing of exceptional circumstances not under the petitioner's control].) ~~The provision is derived from revised rule 37.4(f).~~

~~**Subdivision (e).** Former rule 39.1B(f) declared that if a party was notified of the order setting the hearing only by mail, the 7-day period for filing a notice of intent to seek writ review was extended by 5 days measured from the date of *the order setting the hearing*. Revised rule 38(e)(5) prescribes the same total time (12 days) in that case, but measures the period from the date *the notification is mailed*. The purpose of this substantive change is to ensure that if mailing of the notification is delayed the party still has adequate time to prepare and file any notice of intent.~~

~~**Subdivision (f).** To implement the change in revised rule 38(e)(5) discussed in the preceding comment, revised rule 38(f)(2) provides that if the party was notified of the order setting the hearing only by mail, the clerk must advise the reviewing court of the date that the notification was mailed.~~

~~**Subdivision (g).** In the interest of completeness, revised rule 38(g)(2) specifies that the clerk's transcript must include, in addition to all items listed in revised rule 37.1(a), the notice of intent and proof of service.~~

~~**Former rule 39.1B(d) (e).** Subdivisions (d) and (e) of former rule 39.1B were deleted because they expressly or in effect duplicated provisions of Welfare and Institutions Code section 366.26(*l*). No substantive change is intended.~~

Rule 8.652. ~~38.1.~~ Writ petition to review order setting hearing under Welfare and Institutions Code section 366.26 and rule ~~1436.5~~ 5.600

(a) Petition

(1) The petition must include:

(A) The identities of the parties;

(B) The date on which the superior court made the order setting the hearing;

(C) The date on which the hearing is scheduled to be held;

(D) A summary of the grounds of the petition; and

(E) The relief requested.

(2) The petition must be liberally construed.

(3) The petition must be accompanied by points and authorities.

(b) Contents of points and authorities

(1) The points and authorities must provide a summary of the significant facts, limited to matters in the record.

(2) The points and authorities must state each point under a separate heading or subheading summarizing the point and support each point by argument and citation of authority.

(3) The points and authorities must support any reference to a matter in the record by a citation to the record. The points and authorities should explain the significance of any cited portion of the record and note any disputed aspects of the record.

(c) Time to file petition and response

(1) The petition must be served and filed within 10 days after the record is filed in the reviewing court.

(2) Any response must be served and filed:

(A) Within 10 days—or, if the petition was served by mail, within 15 days—after the petition is filed, or

(B) Within 10 days after a respondent receives a request from the reviewing court for a response, unless the court specifies a shorter time.

(d) Sending the writ

Petitioner must send the writ to all parties entitled to receive notice under Welfare and Institutions Code section 294, the child's Court Appointed Special Advocate (CASA) volunteer, the child's present caregiver, and any de facto parent given standing to participate in the juvenile court proceedings.

(e) Order to show cause or alternative writ

If the court intends to determine the petition on the merits, it must issue an order to show cause or alternative writ.

(f) Augmenting or correcting the record in the reviewing court

(1) Except as provided in (2) and (3), rule ~~12~~ 8.155 governs any augmentation or correction of the record.

(2) The petitioner must serve and file any request for augmentation or correction within 5 days—or, if the record exceeds 600 pages, within 10 days—after receiving the record. A respondent must serve and file any such request within five days after the petition is filed.

(3) An order augmenting or correcting the record may grant no more than 15 days for compliance. The clerk and the reporter must give the order the highest priority.

(4) The clerk must certify and send any supplemental transcripts as required by rule ~~38~~ 8.650(h).

(g) Stay

The reviewing court may stay the hearing set under Welfare and Institutions Code section 366.26, but must require an exceptional showing of good cause.

(h) Oral argument

(1) The reviewing court must hear oral argument within 30 days after the response is filed or due to be filed, unless the court extends the time for good cause or counsel waive argument.

(2) If argument is waived, the cause is deemed submitted not later than 30 days after the response is filed or due to be filed.

(i) Decision

(1) Absent exceptional circumstances, the reviewing court must decide the petition on the merits by written opinion.

(2) The reviewing court clerk must promptly notify the parties of any decision and must promptly send a certified copy of any writ or order to the court named as respondent.

(3) If the writ or order stays or prohibits proceedings set to occur within seven days or requires action within seven days—or in any other urgent situation—the reviewing court clerk must make a reasonable effort to notify the clerk of the respondent court by telephone. The clerk of the respondent court must then notify the judge or officer most directly concerned.

(4) The reviewing court clerk need not give telephonic notice of the summary denial of a writ, unless a stay previously issued and will be dissolved.

Advisory Committee Comment [revised version]

Subdivision (e). Rule 8.652(e) tracks the second sentence of former rule 39.1B(*l*). (But see *Maribel M. v. Superior Court* (1998) 61 Cal.App.4th 1469, 1471–1476.)

Subdivision (i). Rule 8.652(i)(1) tracks former rule 39.1B(o). (But see *Maribel M. v. Superior Court* (1998) 61 Cal.App.4th 1469, 1471–1476.)

Advisory Committee Comment [version showing revisions]

~~Revised rule 38.1 restates the portions of former rule 39.1B that provided for a writ petition to review an order setting a hearing under Welfare and Institutions Code section 366.26. The portions of the former rule that provided for the *notice of intent* to file the petition are restated in revised rule 38.~~

~~**Subdivision (a).** Revised rule 38.1(a)(1) is new. It fills a gap, setting out the essential elements of a writ petition filed under this rule.~~

~~**Subdivision (b).** Revised rule 38.1(b) restates former rule 39.1B(j) but conforms it to the requirements of case law and the relevant provisions of rule 14.~~

Subdivision ~~(d)~~(e). ~~Revised~~ Rule ~~38.1~~ 8.652~~(d)~~(e) tracks the second sentence of former rule 39.1B(*l*). (But see *Maribel M. v. Superior Court* (1998) 61 Cal.App.4th 1469, 1471–1476.)

~~**Subdivision (e).** Former rule 39.1B(o) required any augmentation or correction of the record to be conducted "under rule 12 or rule 35(e) [now rule 32.1]." In a substantive change intended to expedite these proceedings, revised rule 38.1(e)(1) limits the cross-reference to rule 12. The reviewing court should control the terms and conditions of augmentation or correction.~~

~~Revised rule 38.1(e)(4) fills a gap.~~

~~**Subdivision (f).** Revised rule 38.1(f) restates former rule 39.1B(p) but simplifies and broadens its wording in order to permit a stay, for example, when the time remaining before the scheduled date of the hearing under Welfare and Institutions Code section 366.26 is inadequate to permit proper review. The wording of the provision is consistent with revised rules 38(d) and 37.4(f).~~

Subdivision ~~(h)~~(i). ~~Revised~~ Rule ~~38.1~~ 8.652~~(h)~~(i)(1) tracks former rule 39.1B(o). (But see *Maribel M. v. Superior Court* (1998) 61 Cal.App.4th 1469, 1471–1476.) ~~The revised rule deletes as superfluous, however, the provision of the former rule requiring that in the absence of exceptional circumstances the reviewing court must "review the petition . . . ." The reviewing court must necessarily "review the petition" to determine whether there are any exceptional circumstances.~~

~~Former rule 39.1B(r) required the reviewing court clerk, in urgent situations, to give the respondent court clerk telephonic notice of a writ or order prohibiting any proceedings, but declared that telephonic notice of a summary denial was unnecessary "whether or not a stay was previously issued." To provide for the possibility of the reviewing court's issuing a stay but subsequently dissolving it and summarily denying relief, revised rule 38.1(h)(4) declares instead that the reviewing court clerk need not give such telephonic notice "unless a stay previously issued and will be dissolved."~~

Rule 8.654. ~~38.2.~~ Notice of intent to file writ petition under Welfare and Institutions Code section 366.28 to review order designating specific placement of a dependent child after termination of parental rights

(a) Application

Rules ~~38.2 and 38.3~~ 8.654–8.656 govern writ petitions to review placement orders following termination of parental rights entered on or after January 1, 2005. "Posttermination placement order" as used in this rule and rule ~~38.3~~ 8.656 refers to orders following termination of parental rights. Rule ~~56~~ 8.700 does not apply to petitions governed by these rules.

(b) Purpose

The purpose of this rule is to facilitate and implement Welfare and Institutions Code section 366.28. Delays caused by appeals from court orders designating the specific placement of a dependent child after parental rights have been terminated may cause a substantial detriment to the child.

(c) Who may file

The petitioner's trial counsel—or if the petitioner was not represented by counsel at the hearing at which the posttermination placement order was issued, the petitioner—is responsible for filing any notice of intent and writ petition under rules ~~38.2 and 38.3~~ 8.654–8.656. Trial counsel is encouraged to seek assistance from, or consult with, attorneys experienced in writ procedure.

(d) Extensions of time

The superior court may not extend any time period prescribed by rules ~~38.2–38.3~~ 8.654–8.656. The reviewing court may extend any time period, but must require an exceptional showing of good cause.

(e) Notice of intent

(1) A party seeking writ review under rules ~~38.2 and 38.3~~ 8.654–8.656 must file a notice of intent to file a writ petition and a request for the record.

(2) The notice must include all known dates of the hearing that resulted in the order under review.

(3) The notice must be signed by the party intending to file the petition or, if filed on behalf of the child, by the attorney of record for the child. The reviewing court may waive this requirement for good cause on the basis of a declaration by the attorney of record explaining why the party could not sign the notice.

(4) The notice must be served and filed within seven days after the date of the posttermination placement order~~,~~ or, if the order was made by a referee not acting as a temporary judge, within seven days after the referee's order becomes final under rule ~~1417~~ 5.540(c). The date of the posttermination placement order is the date on which the court states the order on the record orally or in writing, whichever first occurs.

(5) If the party was notified of the posttermination placement order only by mail, the notice of intent must be filed within 12 days after the date that the clerk mailed the notification.

(f) Premature or late notice of intent to file writ petition

(1) A notice of intent to file a writ petition under section 366.28 is premature if filed before a date for a postdetermination placement order has been made. The reviewing court may treat the notice as filed immediately after the postdetermination order has been made.

(2) The superior court clerk must mark a late notice of intent to file a writ petition under 366.28 "Received [date] but not filed," notify the party that the notice was not filed because it was late, and send a copy of the marked notice to the party's counsel of record, if applicable.

(g) Sending the notice of intent

(1) When the notice of intent is filed, the superior court clerk must immediately mail a copy of the notice to:

(A) Each counsel of record;

(B) Each relevant party, including the child, if the child is 10 years of age or older; the child's present caregiver; any legal guardian; and any person who has been declared a de facto parent and given standing to participate in the juvenile court proceedings;

(C) The probation officer or social worker;

(D) The child's Court Appointed Special Advocate; and

(E) The tribe of an Indian child and the Indian custodian.

(2) The clerk must promptly send a copy of the notice and a proof of service list to the reviewing court, by first-class mail or facsimile. If the party was notified of the posttermination placement order only by mail, the clerk must include the date that the notification was mailed.

(h) Preparing the record

When the notice of intent is filed, the superior court clerk must:

(1) Immediately notify the reporter by telephone and in writing to prepare a reporter's transcript of the oral proceedings at the hearing that resulted in the order under review and deliver the transcript to the clerk within 12 calendar days after the notice of intent is filed; and

(2) Within 20 days after the notice of intent is filed, prepare a clerk's transcript that includes the notice of intent, proof of service, and all items listed in rule ~~37.1~~ 8.604(a).

(i) Sending the record

When the transcripts are certified as correct, the superior court clerk must immediately send:

(1) The original transcripts to the reviewing court by the most expeditious method, noting the sending date on each original, and

(2) One copy of each transcript to each counsel of record and any unrepresented party and unrepresented custodian of the dependent child by any means as fast as United States Postal Service express mail.

(j) Reviewing court clerk's duties

(1) The reviewing court clerk must promptly lodge the notice of intent. When the notice is lodged, the reviewing court has jurisdiction over the writ proceedings.

(2) When the record is filed in the reviewing court, that court's clerk must immediately notify the parties, stating the date on which the 10-day period for filing the writ petition under rule ~~38.3~~ 8.656(c)(1) will expire.

Rule 8.656. ~~38.3.~~ Writ petition under Welfare and Institutions Code section 366.28 and rule ~~1436.5~~ 5.600 to review order designating specific placement of a dependent child after termination of parental rights

(a) Petition

(1) The petition must include:

(A) The identities of the parties;

(B) The date on which the superior court made the posttermination placement order;

(C) A summary of the grounds of the petition; and

(D) The relief requested.

(2) The petition must be liberally construed.

(3) The petition must be accompanied by a memorandum of points and authorities.

(b) Contents of memorandum ~~points and authorities~~

(1) The ~~points and authorities~~ memorandum must provide a summary of the significant facts, limited to matters in the record.

(2) The ~~points and authorities~~ memorandum must state each point under a separate heading or subheading summarizing the point and support each point by argument and citation of authority.

(3) The ~~points and authorities~~ memorandum must support any reference to a matter in the record by a citation to the record. The ~~points and authorities~~ memorandum should explain the significance of any cited portion of the record and note any disputed aspects of the record.

(c) Time to file petition and response

(1) The petition must be served and filed within 10 days after the record is filed in the reviewing court. The petitioner must give notice to all parties entitled to receive notice under rule ~~38.2~~ 8.654.

(2) Any response must be served and filed:

(A) Within 10 days—or, if the petition was served by mail, within 15 days—after the petition is filed, or

(B) Within 10 days after a respondent receives a request from the reviewing court for a response, unless the court specifies a shorter time.

(d) Sending the writ

Petitioner must send the writ to all parties entitled to receive notice under Welfare and Institutions Code section 294, any Court Appointed Special Advocate (CASA) volunteer, the child's present caregiver, the child's prospective adoptive parties, and any de facto parent given standing to participate in the juvenile court proceedings.

(e) Order to show cause or alternative writ

If the court intends to determine the petition on the merits, it must issue an order to show cause or alternative writ.

(f) Augmenting or correcting the record in the reviewing court

(1) Except as provided in (2) and (3), rule ~~12~~ 8.155 governs augmentation or correction of the record.

(2) The petitioner must serve and file any request for augmentation or correction within 5 days—or, if the record exceeds 600 pages, within 10 days—after receiving the record. A respondent must serve and file any such request within 5 days after the petition is filed.

(3) An order augmenting or correcting the record may grant no more than 15 days for compliance. The clerk and the reporter must give the order the highest priority.

(4) The clerk must certify and send any supplemental transcripts as required by rule ~~38.2(h)~~ 8.654(i).

(g) Stay

A request by petitioner for a stay of the posttermination placement order will not be granted unless the writ petition shows that implementation of the superior court's placement order pending the reviewing court's decision is likely to cause detriment to the child if the order is ultimately reversed.

(h) Oral argument

(1) The reviewing court must hear oral argument within 30 days after the response is filed or due to be filed, unless the court extends the time for good cause or counsel waive argument.

(2) If argument is waived, the cause is deemed submitted not later than 30 days after the response is filed or due to be filed.

(i) Decision

(1) Absent exceptional circumstances, the reviewing court must review the petition and decide it on the merits by written opinion.

(2) The reviewing court clerk must promptly notify the parties of any decision and must promptly send a certified copy of any writ or order to the court named as respondent.

(3) If the writ or order stays or requires action within seven days—or in any other urgent situation—the reviewing court clerk must make a reasonable effort to notify the clerk of the respondent court by telephone. The clerk of the respondent court must then notify the judge or officer most directly concerned.

(4) The reviewing court clerk need not give telephonic notice of the summary denial of a writ, unless a stay previously issued and will be dissolved.

(i) Right to appeal other orders

This section does not affect the right of a parent, a legal guardian, or the child to appeal any order that is otherwise appealable and that is issued at a hearing held under Welfare and Institutions Code section 366.26.

Article 3. Hearing and Decision

Rule 8.670. ~~38.4.~~ Hearing and decision in the Court of Appeal

Except as provided in rules ~~37–38.3~~ 8.600–8.656, rules ~~22–26~~ 8.252–8.272 govern hearing and decision in the Court of Appeal in juvenile cases.

~~**Advisory Committee Comment**~~

~~Rule 38.4 is new, but it is not a substantive change. It clarifies the applicability to juvenile cases of the relevant rules governing the hearing and decision of civil appeals in the Court of Appeal.~~

Rule 8.672. ~~38.5.~~ Hearing and decision in the Supreme Court

Rules ~~28–29.9~~ 8.300–8.352 govern hearing and decision in the Supreme Court in juvenile cases.

~~**Advisory Committee Comment**~~

~~Rule 38.5 is new, but it is not a substantive change. It clarifies the applicability to juvenile cases of the rules governing the hearing and decision of civil appeals in the Supreme Court.~~

Rule 8.674. ~~38.6.~~ Procedures and data

(a) Procedures

The judges and clerks of the superior courts and the reviewing courts must adopt procedures to identify the records and expedite the processing of all appeals and writs in juvenile cases.

(b) Data

The clerks of the superior courts and the reviewing courts must the provide data required to assist the Judicial Council in evaluating the effectiveness of the rules governing appeals and writs in juvenile cases.

~~**Advisory Committee Comment**~~

~~Revised rule 38.6 restates former rules 39.1A(f), 39.2(e), and 39.2A(e).~~

Chapter 7. Miscellaneous Appeals

Rule 8.680. ~~39.~~ Appeal from order establishing conservatorship

(a) Application

Except as otherwise provided in this rule, rules ~~30–33.3~~ 8.400–8.468 govern appeals from orders establishing conservatorships under Welfare and Institutions Code section 5350 et seq.

(b) Clerk's transcript

The clerk's transcript must contain:

(1) The petition;

(2) Any demurrer or other plea;

(3) Any written motion with supporting and opposing memoranda and attachments;

(4) Any filed medical or social worker reports;

(5) All court minutes;

(6) All instructions submitted in writing, each noting the party requesting it;

(7) Any verdict;

(8) Any written opinion of the court;

(9) The judgment or order appealed from;

(10) The notice of appeal; and

(11) Any application for additional record and any order on the application.

(c) Reporter's transcript

The reporter's transcript must contain all oral proceedings, excluding the voir dire examination of jurors and any opening statement.

(d) Sending the record

The clerk must not send a copy of the record to the Attorney General or the district attorney unless that office represents a party.

(e) Briefs

The parties must not serve copies of their briefs:

(1) On the Attorney General or the district attorney, unless that office represents a party~~,~~; or

(2) On the Supreme Court under rule ~~44(b)(2)(A)~~ 8.44(b)(1).

~~**Advisory Committee Comment**~~

~~Revised rule 39 is former rule 39.4.~~

Rule 8.682. ~~39.1.~~ Appeal from judgment authorizing conservator to consent to sterilization of conservatee

(a) Application

Except as otherwise provided in this rule, rules ~~30–33.3~~ 8.400–8.468 govern appeals from judgments authorizing a conservator to consent to the sterilization of a developmentally disabled adult conservatee.

(b) When appeal is taken automatically

An appeal from a judgment authorizing a conservator to consent to the sterilization of a developmentally disabled adult conservatee is taken automatically, without any action by the conservatee, when the judgment is rendered.

(c) Superior court clerk's duties

After entering the judgment, the clerk must immediately:

(1) Begin preparing a clerk's transcript and notify the reporter to prepare a reporter's transcript, and

(2) Mail certified copies of the judgment to the Court of Appeal and the Attorney General.

(d) Clerk's transcript

The clerk's transcript must contain:

(1) The petition and notice of hearing;

(2) All court minutes;

(3) Any application, motion, or notice of motion, with supporting and opposing memoranda and attachments;

(4) Any report or other document submitted to the court;

(5) Any transcript of a proceeding pertaining to the case;

(6) The statement of decision; and

(7) The judgment or order appealed from.

(e) Reporter's transcript

The reporter's transcript must contain all oral proceedings, including:

(1) All proceedings at the hearing on the petition, with opening statements and closing arguments;

(2) All proceedings on motions;

(3) Any comments on the evidence by the court; and

(4) Any oral opinion or oral statement of decision.

(f) Preparing and sending transcripts

(1) The clerk and the reporter must prepare and send an original and two copies of each of the transcripts as provided in rule ~~32~~ 8.436.

(2) Probate Code section 1963 governs the cost of preparing the record on appeal.

(g) Confidential material

(1) Written reports of physicians, psychologists, and clinical social workers, and any other matter marked confidential by the court, may be inspected only by court personnel, the parties and their counsel, the district appellate project, and other persons designated by the court.

(2) Material under (1) must be sent to the reviewing court in a sealed envelope marked "CONFIDENTIAL—MAY NOT BE EXAMINED WITHOUT COURT ORDER."

(h) Trial counsel's continuing representation

To expedite preparation and certification of the record, the conservatee's trial counsel must continue to represent the conservatee until appellate counsel is retained or appointed.

(i) Appointment of appellate counsel

If appellate counsel has not been retained for the conservatee, the reviewing court must appoint such counsel.

~~**Advisory Committee Comment**~~

~~Revised rule 39.1 is former rule 39.8. It implements Probate Code section 1963(b).~~

~~**Subdivision (a).** Former rule 39.8(a) stated that it governed appeals from judgments "*authorizing the appointment of a limited conservator* to consent to sterilization" of a developmentally disabled adult conservatee. (Italics added.) But the statute addresses instead appeals from judgments "*authorizing the conservator of a person to consent* to the sterilization" (Prob. Code, § 1962(b), italics added), and the power to consent is not restricted to a limited conservator (*id.*, § 1960). To conform to the statutes, revised rule 39.1(a) provides that it governs appeals from judgments "authorizing a conservator to consent" to such sterilization.~~

~~**Subdivision (b).** Former rule 39.8(c) stated that an appeal was deemed automatically taken from a judgment authorizing consent to sterilization upon *entry* of that judgment. But the statute provides instead that the appeal is automatically taken when the judgment is *rendered*. (Prob. Code, § 1962(b).) Revised rule 39.1(b) conforms to the statute.~~

~~**Subdivision (g).** Filling a gap, revised rule 39.1(g)(1) adds the district appellate project to the list of entities entitled to inspect confidential reports in the record. To allow the project to inspect any such materials would help the project (1) make its initial recommendation for appointment of counsel for the appellant, (2) assist that attorney in representing the client, and (3) ensure that the record is complete. The change is substantive.~~

~~**Subdivision (h).** Former rule 39.8(g) provided for certain duties of trial counsel during the period of record preparation. Revised rule 39.1(h) largely deletes these provisions because the topic is now covered by rule 32. This is a substantive change.~~

Chapter 8. Miscellaneous Writs

Rule 8.700. ~~56. Original proceedings~~ Petitions for writ of mandate, certiorari, or prohibition

(a) Application

(1) This rule governs petitions to the reviewing court for writs of mandate, certiorari, or prohibition, or other writs within its original jurisdiction. In all respects not provided for in this rule, rule ~~14~~ 8.204 applies.

(2) This rule does not apply to petitions for writs of habeas corpus, except as provided in rule ~~60.5~~ 8.550, or to petitions for writs of review under rules ~~57–59~~ 8.704–8.708.

(b) Petition

(1) If the petition could have been filed first in a lower court, it must explain why the reviewing court should issue the writ as an original matter.

(2) If the petition names as respondent a judge, court, board, or other officer acting in a public capacity, it must disclose the name of any real party in interest.

(3) If the petition seeks review of trial court proceedings that are also the subject of a pending appeal, the notice "Related Appeal Pending" must appear on the cover of the petition and the first paragraph of the petition must state:

(A) The appeal's title, trial court docket number, and any reviewing court docket number, and

(B) If the petition is filed under Penal Code section 1238.5, the date the notice of appeal was filed.

(4) The petition must be verified.

(5) The petition must be accompanied by a memorandum of points and authorities, which need not repeat facts alleged in the petition.

(6) Rule ~~14~~ 8.204(c) governs the length of the petition and memorandum of points and authorities, but the tables, the certificate, the verification, and any supporting documents are excluded from the limits stated in rule ~~14~~ 8.204(c)(1) and (2).

(7) If the petition requests a temporary stay, it must comply with rule ~~49.5~~ 8.116 and explain the urgency.

(c) Contents of supporting documents

(1) A petition that seeks review of a trial court ruling must be accompanied by an adequate record, including copies of:

(A) The ruling from which the petition seeks relief;

(B) All documents and exhibits submitted to the trial court supporting and opposing the petitioner's position;

(C) Any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling under review; and

(D) A reporter's transcript of the oral proceedings that resulted in the ruling under review.

(2) If a transcript under (1)(D) is unavailable, the record must include a declaration by counsel:

(A) Explaining why the transcript is unavailable and fairly summarizing the proceedings, including counsel's arguments and any statement by the court supporting its ruling; or

(B) Stating that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which must be a date prior to any action requested of the reviewing court other than issuance of a temporary stay supported by other parts of the record.

(3) A declaration under (2) may omit a full summary of the proceedings if part of the relief sought is an order to prepare a transcript for use by an indigent criminal defendant in support of the petition and if the declaration demonstrates the petitioner's need for and entitlement to the transcript.

(4) In exigent circumstances, the petition may be filed without the documents required by (1)(A)–(C) if counsel files a declaration that explains the urgency and the circumstances making the documents unavailable and fairly summarizes their substance.

(5) If the petitioner does not submit the required record or explanations or does not present facts sufficient to excuse the failure to submit them, the court may summarily deny a stay request, the petition, or both.

(d) Form of supporting documents

(1) Documents submitted under (c) must comply with the following requirements:

(A) They must be bound together at the end of the petition or in separate volumes not exceeding 300 pages each. The pages must be consecutively numbered.

(B) They must be index-tabbed by number or letter.

(C) They must begin with a table of contents listing each document by its title and its index-tab number or letter. If a document has attachments, the table of contents must give the title of each attachment and a brief description of its contents.

(2) The clerk must file any supporting documents not complying with (1), but the court may notify the petitioner that it may strike or summarily deny the petition if the documents are not brought into compliance within a stated reasonable time of not less than five days.

(3) Rule ~~44(b)(1)~~ 8.44(a) governs the number of copies of supporting documents to be filed in the Supreme Court~~;~~. Rule ~~44(b)(2)~~ 8.44(b) governs the number of supporting documents to be filed in the Court of Appeal.

(e) Sealed records

Rule ~~12.5~~ 8.160 applies if a party seeks to lodge or file a sealed record or to unseal a record.

(f) Service

(1) If the respondent is the superior court or a judge of that court, the petition and one set of supporting documents must be served on any named real party in interest, but only the petition must be served on the respondent.

(2) If the respondent is not the superior court or a judge of that court, both the petition and one set of supporting documents must be served on the respondent and on any named real party in interest.

(3) The proof of service must give the telephone number of each attorney served and name each party represented by each attorney.

(4) The petition must be served on a public officer or agency when required by statute or rule ~~44.5~~ 8.29.

(5) The clerk must file the petition even if its proof of service is defective, but if the petitioner fails to file a corrected proof of service within five days after the clerk gives notice of the defect the court may strike the petition or impose a lesser sanction.

(6) The court may allow the petition to be filed without proof of service.

(g) Preliminary opposition

(1) Within 10 days after the petition is filed, the respondent or any real party in interest, separately or jointly, may serve and file a preliminary opposition.

(2) An opposition must contain points and authorities and a statement of any material fact not included in the petition.

(3) Within 10 days after an opposition is filed, the petitioner may serve and file a reply.

(4) Without requesting opposition or waiting for a reply, the court may grant or deny a request for temporary stay, deny the petition, issue an alternative writ or order to show cause, or notify the parties that it is considering issuing a peremptory writ in the first instance.

(h) Return or opposition; reply

(1) If the court issues an alternative writ or order to show cause, the respondent or any real party in interest, separately or jointly, may serve and file a return by demurrer, verified answer, or both. If the court notifies the parties that it is considering issuing a peremptory writ in the first instance, the respondent or any real party in interest may serve and file an opposition.

(2) Unless the court orders otherwise, the return or opposition must be served and filed within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance.

(3) Unless the court orders otherwise, the petitioner may serve and file a reply within 15 days after the return or opposition is filed.

(4) If the return is by demurrer alone and the demurrer is not sustained, the court may issue the peremptory writ without granting leave to answer.

(i) Attorney General's amicus curiae brief

(1) If the court issues an alternative writ or order to show cause, the Attorney General may file an amicus curiae brief without the permission of the Chief Justice or presiding justice, unless the brief is submitted on behalf of another state officer or agency.

(2) The Attorney General must serve and file the brief within 14 days after the return is filed or, if no return is filed, within 14 days after the date it was due.

(3) The brief must provide the information required by rule ~~13~~ 8.200(c)(2) and comply with rule ~~13~~ 8.200(c)(4).

(4) Any party may serve and file an answer within 14 days after the brief is filed.

(j) Notice to trial court

(1) If a writ or order issues directed to any judge, court, board, or other officer, the reviewing court clerk must promptly send a certified copy of the writ or order to the person or entity to whom it is addressed.

(2) If the writ or order stays or prohibits proceedings set to occur within seven days or requires action within seven days—or in any other urgent situation—the reviewing court clerk must make a reasonable effort to notify the clerk of the respondent court by telephone. The clerk of the respondent court must then notify the judge or officer most directly concerned.

(3) The clerk need not give telephonic notice of the summary denial of a writ, whether or not a stay previously issued.

(k) Responsive pleading under Code of Civil Procedure section 418.10

If the Court of Appeal denies a petition for writ of mandate brought under Code of Civil Procedure section 418.10(c) and the Supreme Court denies review of the Court of Appeal's decision, the time to file a responsive pleading in the trial court is extended until 10 days after the Supreme Court files its order denying review.

(*l*) Costs

(1) Except in a criminal or juvenile or other proceeding in which a party is entitled to court-appointed counsel, the prevailing party in an original proceeding is entitled to costs if the court resolves the proceeding by written opinion after issuing an alternative writ, an order to show cause, or a peremptory writ in the first instance.

(2) In the interests of justice, the court may award or deny costs as it deems proper.

(3) The opinion or order resolving the proceeding must specify the award or denial of costs.

(4) Rule ~~27~~ 8.276(b)–(d) governs the procedure for recovering costs under this rule.

Advisory Committee Comment [revised version]

Subdivision (b). Because of the importance of the point, rule 8.700(b)(6) explicitly states that the provisions of rule 8.204(c)—and hence the word-count limits imposed by that rule—apply to a petition for original writ.

Subdivision (g). Consistent with practice, rule 8.700 draws a distinction between a "preliminary opposition," which the respondent or a real party in interest may file before the court takes any action on the petition (subd. (g)(1)), and a more formal "opposition," which the respondent or a real party in interest may file if the court notifies the parties that it is considering issuing a peremptory writ in the first instance (subd. (h)(1)).

Subdivision (g)(1) allows the respondent or any real party in interest to serve and file a preliminary opposition within 10 days after the petition is filed. The reviewing court retains the power to act in any case without obtaining an opposition (subd. (g)(4)).

Subdivision (g)(3) allows a petitioner to serve and file a reply within 10 days after an opposition is filed. To permit prompt action in urgent cases, however, the provision recognizes that the reviewing court may act on the petition without waiting for a reply.

Subdivision (g)(4) recognizes that the reviewing court may "grant or deny a request for temporary stay" without requesting opposition or waiting for a reply.

The several references in rule 8.700 to the power of the court to issue a peremptory writ in the first instance after notifying the parties that it is considering doing so (subds. (g)–(h)) implement the rule of *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171.

Subdivision (h). Subdivision (h)(2) requires that the return or opposition be served and filed within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance. To permit prompt action in urgent cases, however, the provision recognizes that the reviewing court may order otherwise.

Subdivision (h)(3) formalizes the common practice of permitting petitioners to file replies to returns and specifies that such a reply must be served and filed within 15 days after the return is filed. To permit prompt action in urgent cases, however, the provision recognizes that the reviewing court may order otherwise.

Advisory Committee Comment [version showing revisions]

~~Revised rule 56 combines the provisions of former rules 56 and 56.4.~~

Subdivision (b). Because of the importance of the point, ~~revised rule 56~~ rule 8.700(b)(6) explicitly states that the provisions of rule ~~14~~ 8.204(c)—and hence the word-count limits imposed by that rule—apply to a petition for original writ.

~~**Subdivision (d).** Revised rule 56(d)(3) fills a gap by specifying that a petitioner must file only one set of supporting documents in the reviewing court. The revised rule, however, recognizes the courts' practice of requiring additional sets of such documents when needed.~~

~~**Subdivision (f).** Revised rule 56 (f)(1) makes it clear that the required supporting documents must not be served on the respondent if the latter, as is commonly the case, is the superior court or a judge of that court.~~

Subdivision (g). Consistent~~ly~~ with practice, ~~revised rule 56~~ rule 8.700 draws a distinction between a "preliminary opposition," which the respondent or a real party in interest may file before the court takes any action on the petition (subd. (g)(1)), and a more formal "opposition," which the respondent or a real party in interest may file if the court notifies the parties that it is considering issuing a peremptory writ in the first instance (subd. (h)(1)).

~~Former rule 56(b) allowed the respondent or any real party in interest to file a preliminary opposition "within five days after service *and* filing" of the petition. Because the date of service and the date of filing do not necessarily coincide, the provision was unclear. In a substantive change, revised rule 56(g)(1) instead~~ Subdivision (g)(1) allows the respondent or any real party in interest to serve and file a preliminary opposition within 10 days after the petition is ~~*filed*~~filed~~, the 5 additional days being allowed for mailing~~. The reviewing court retains the power to act in any case without obtaining an opposition (~~revised rule 56~~subd. (g)(4)).

~~Revised rule 56(g)(3) is new. Former rule 56 did not expressly authorize petitioners to reply to preliminary oppositions, but the reviewing courts often permitted such replies. In a substantive change intended to formalize this practice, revised rule 56~~Subdivision (g)(3) ~~provides that~~allows a petitioner ~~may~~to serve and file a reply within 10 days after an opposition is filed. To permit prompt action in urgent cases, however, the provision recognizes that the reviewing court may act on the petition without waiting for a reply.

~~Filling a gap, revised rule 56~~Subdivision (g)(4) recognizes that the reviewing court may ~~also~~ "grant or deny a request for temporary stay" without requesting opposition or waiting for a reply.

The several references in ~~revised~~ rule ~~56~~8.700 to the power of the court to issue a peremptory writ in the first instance~~,~~ after notifying the parties that it is considering doing so (subds. (g)–(h))~~,~~ implement the rule of *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171. ~~The change is not substantive.~~

Subdivision (h). ~~Former rule 56(f) required the return to be filed "at least five days before the date set for hearing." Because "hearing" in this context meant oral argument before the reviewing court, the provision caused administrative difficulties: for example, the five-day limit allowed little or no time for the petitioner to reply to the return or for the court to prepare for oral argument. In a substantive change intended to alleviate those difficulties, revised rule 56~~Subdivision (h)(2) requires ~~instead~~ that the return or opposition be served and filed within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance. To permit prompt action in urgent cases, however, the provision recognizes that the reviewing court may order otherwise.

~~Revised~~ Subdivision 56(h)(3)~~ is new. In a substantive change, it~~ formalizes the common practice of permitting petitioners to file replies to returns and specifies that such a reply must be served and filed

within 15 days after the return is filed. To permit prompt action in urgent cases, however, the provision recognizes that the reviewing court may order otherwise.

~~**Subdivision (*l*).** Revised rule 56(*l*) is former rule 56.4.~~

Rule 8.704. ~~57.~~ Review of Workers' Compensation Appeals Board cases

(a) Petition

(1) A petition to review an order, award, or decision of the Workers' Compensation Appeals Board must include:

(A) The order, award, or decision to be reviewed, and

(B) The workers' compensation judge's minutes of hearing and summary of evidence, findings and opinion on decision, and report and recommendation on the petition for reconsideration.

(2) If the petition claims that the board's ruling is not supported by substantial evidence, it must fairly state and attach copies of all the relevant material evidence.

(3) The petition must be accompanied by proof of service of two copies of the petition on the Secretary of the Workers' Compensation Appeals Board in San Francisco and one copy on each party who appeared in the action and whose interest is adverse to the petitioner. Service on the board's local district office is not required.

(b) Answer and reply

(1) Within 25 days after the petition is filed, the board or any real party in interest may serve and file an answer and any relevant exhibits not included in the petition.

(2) Within 15 days after an answer is filed, the petitioner may serve and file a reply.

Advisory Committee Comment [revised version]

Subdivision (a). Subdivision (a)(3) specifies that the petition must be served on the Secretary of the Workers' Compensation Appeals Board in San Francisco. Neither the petition nor a courtesy copy should be served on the local district office of the board.

Subdivision (b). To clarify that a respondent may rely on exhibits filed with the petition without duplicating them in the answer, subdivision (b)(1) specifies that exhibits filed with an answer must be limited to exhibits "not included in the petition."

Advisory Committee Comment [version showing revisions]

Subdivision (a). ~~In a substantive change intended to assist the reviewing court in understanding the procedural history of the case and the stipulations and evidence introduced at the hearing, revised rule 57(a)(1)(B) requires the petition to include the minutes of hearing and summary of evidence prepared by the workers' compensation judge.~~

~~To assist the reviewing court in determining the merits, revised rule 57(a)(2) requires that a petition that raises any issue of the substantiality of the evidence must not only state, but must also attach copies of, all the material evidence relevant to that issue. The change is substantive.~~

~~To clarify on whom and where the petition must be served, revised rule 57~~Subdivision (a)(3) specifies that ~~it~~ the petition must be served on the Secretary of the Workers' Compensation Appeals Board in San Francisco. Neither the petition nor a courtesy copy should be served on the local district office of the board.

Subdivision (b). ~~Former rule 57(b) measured the time to file an answer (or reply) from the date the petition (or answer) was *served;* revised rule 57(b) instead measures that time from the date the petition (or answer) is *filed*. In each case the revised rule allows five additional days for mailing. The principal reason for this substantive change is that the filing date of a document is more reliable than the date appearing on its proof of service. Using the filing date results in greater certainty for the reviewing court and makes it easier for the reviewing court clerk to verify the relevant date, both when the motion is filed and later when an opposition is presented for filing. The rule is thus made consistent with the rules providing that the filing date controls the time to prepare answers and replies to briefs and petitions (see, e.g, rules 15(a), 28(e), 29.1(a), 29.5(b), 33(c), and 36(c)).~~

To clarify that a respondent may rely on exhibits filed with the petition without duplicating them in the answer, ~~revised rule 57~~ subdivision (b)(1) specifies that exhibits filed with an answer must be limited to exhibits "not included in the petition."

Rule 8.706. ~~58.~~ Review of Public Utilities Commission cases

(a) Petition

(1) A petition to review an order or decision of the Public Utilities Commission must be verified and must be served on the executive director and general counsel of the commission and any real parties in interest.

(2) A real party in interest is one who was a party of record to the proceeding and took a position adverse to the petitioner.

(b) Answer and reply

(1) Within 35 days after the petition is filed, the commission or any real party in interest may serve and file an answer.

(2) Within 25 days after an answer is filed, the petitioner may serve and file a reply.

~~**Advisory Committee Comment**~~

~~**Subdivision (a).** To clarify on whom the petition must be served, revised rule 58(a)(1) specifies that it must be served on the executive director and general counsel of the Public Utilities Commission.~~

~~**Subdivision (b).** Former rule 58(b) measured the time to file an answer (or reply) from the date the petition (or answer) was *served;* revised rule 58(b) instead measures that time from the date the petition (or answer) is *filed*. In each case the revised rule allows five additional days for mailing. The principal reason for this substantive change is that the filing date of a document is more reliable than the date appearing on its proof of service. Using the filing date results in greater certainty for the reviewing court and makes it easier for the reviewing court clerk to verify the relevant date, both when the motion is filed and later when an opposition is presented for filing. The rule is thus made consistent with the rules providing that the filing date controls the time to prepare answers and replies to briefs and petitions (see, e.g, rules 15(a), 28(e), 29.1(a), 29.5(b), 33(c), and 36(c)).~~

Rule 8.708. ~~59.~~ Review of Agricultural Labor Relations Board and Public Employment Relations Board cases

(a) Petition

(1) A petition to review an order or decision of the Agricultural Labor Relations Board or the Public Employment Relations Board must be filed in the Court of Appeal and served on the executive secretary of the Agricultural Labor Relations Board or the general counsel of the Public Employment Relations Board in Sacramento and on any real parties in interest.

(2) A real party in interest is a party of record to the proceeding.

(3) The petition must be verified.

(b) Record

Within the time permitted by statute, the board must file the certified record of the proceedings and simultaneously file and serve on all parties an index to that record.

(c) Briefs

(1) The petitioner must serve and file its brief within 35 days after the index is filed.

(2) Within 35 days after the petitioner's brief is filed, the board must—and any real party in interest may—serve and file a respondent's brief.

(3) Within 25 days after the respondent's brief is filed, the petitioner may serve and file a reply brief.

~~**Advisory Committee Comment**~~

~~**Subdivision (a).** Former rule 59(a) provided that a petition to review an order or decision of the Public Employment Relations Board must be served on the "executive director" of that board. Because that position has been abolished, revised rule 59(a)(1) provides that service must be made on the board's general counsel.~~

~~Former rule 59(a) specified that the petition was not required to be verified if "the petitioner was exempted from verifying pleadings by Code of Civil Procedure section 446," and that the petition was required to be served "as provided in Code of Civil Procedure sections 1010–1015." Revised rule 59 deletes the quoted provisions as unnecessary; the cited statutes apply to *all* the rules of court. The change is not substantive.~~

~~**Subdivision (b).** Former rule 59(b) listed several statutes prescribing the times within which the Agricultural Labor Relations Board or the Public Employment Relations Board must file the certified record and serve and file an index to the record. The provision was misleading because the list was incomplete; revised rule 59(b) deletes it and provides simply that the two boards must act "[w]ithin the time permitted by statute . . . ." The change is not substantive.~~

~~**Subdivision (c).** Former rule 59(c)–(d) measured the time to file the petitioner's brief, a respondent's brief, or a reply brief from the date that the index, the petitioner's brief, or the respondent's brief was served; revised rule 59(c) instead measures those times from the date that the index, the petitioner's brief, or the respondent's brief is filed. In each case the revised rule allows five additional days for mailing. The principal reason for this substantive change is that the filing date of a document is more reliable than the date appearing on its proof of service. Using the filing date results in greater certainty for the reviewing court and makes it easier for the reviewing court clerk to verify the relevant date, both when the motion is filed and later when an opposition is presented for filing. The rule is thus made consistent with the rules providing that the filing date controls the time to prepare answers and replies to briefs and petitions (see, e.g, rules 15(a), 28(c), 29.1(a), 29.5(b), 33(c), and 36(c)).~~

Chapter 9. Transfer of Appellate Division Cases to the Court of Appeal

Rule 8.750. ~~61. Scope of rules~~ Application

Rules ~~61 through 69~~ 8.750–8.773 ~~govern~~ apply to proceedings for transferring cases within the appellate jurisdiction of the superior court—other than appeals in small claims cases—to the Court of Appeal for review. Unless the context requires otherwise, the term "case" as used in these rules means cases within that jurisdiction.

Rule 8.752. ~~62.~~ Transfer authority

A Court of Appeal may order a case transferred to it for hearing and decision if the appellate division certifies under rule ~~63~~ 8.755—or the Court of Appeal determines under rule ~~64~~ 8.758—that transfer is necessary to secure uniformity of decision or to settle an important question of law.

Rule 8.755. ~~63.~~ Certification

(a) Authority to certify

(1) The appellate division may certify a case for transfer to the Court of Appeal on its own motion or on a party's application.

(2) A case may be certified by a majority of the appellate division judges to whom the case has been assigned or who decided the appeal or, if the case has not yet been assigned, by any two appellate division judges ~~of the appellate division~~. If ~~any of the~~ an assigned or deciding ~~appellate division~~ judges ~~is~~ unable to act on the certification, ~~then~~ a judge designated or assigned to the appellate division by the chairperson of the Judicial Council may act in ~~his or her~~ that judge's place.

(b) Application for certification

(1) A party may serve and file an application for certification at any time after the record on appeal is filed in the appellate division and within 15 days after judgment is pronounced or a modification order changing the appellate judgment is filed. The party may include the application in a petition for rehearing.

(2) The application must explain why transfer is necessary to secure uniformity of decision or to settle an important question of law.

(3) Within five days after the application is filed, any other party may serve and file an opposition.

(4) No hearing will be held on the application. Failure to certify the case is deemed a denial of the application.

(c) Finality of appellate division judgments

An appellate division judgment is final in that court as provided in rule 107.

(d) Time to certify

A case may be certified at any time after the record on appeal is filed in the appellate division and before the appellate division judgment is final in that court.

(e) Contents of certification

A certification must:

(1) Briefly describe any conflict of decision—citing the decisions creating the conflict—or important question of law to be settled; and

(2) State whether there was a judgment on appeal and, if so, its date and disposition.

(f) Superior court clerk's duties

(1) If the appellate division orders certification, the clerk must promptly send a copy of the order to the Court of Appeal clerk, the parties, and, in a criminal case, the Attorney General.

(2) If the appellate division denies an application by order, the clerk must promptly send a copy to the parties.

Rule 8.758. ~~64.~~ Transfer

(a) Authority to transfer on Court of Appeal's own motion or a party's petition

The Court of Appeal may order transfer of a case on the court's own motion or on a party's petition to transfer.

(b) Petition to transfer

(1) If the appellate division denies an application for certification and does not certify its opinion for publication, a party may serve and file in the Court of Appeal a petition to transfer the case to that court.

(2) The petition must be served and filed within eight days after the appellate division judgment is final in that court and must show delivery of a copy to the appellate division.

(3) The petition must explain why transfer is necessary to secure uniformity of opinion or to settle an important question of law.

(4) Within seven days after the petition is filed, any other party may serve and file an answer.

(5) The petition and any answer must comply as nearly as possible with rule ~~28.1~~ 8.304.

(c) Time to transfer

(1) The Court of Appeal may order transfer:

(A) After certification or on its own motion, within 20 days after the record on transfer is filed in the Court of Appeal; or

(B) On petition to transfer, within 20 days after the petition is filed.

(2) Within either period specified in (1), the Court of Appeal may order an extension not exceeding 20 days.

(3) If the Court of Appeal does not timely order transfer, transfer is deemed denied.

(d) Letter supporting or opposing transfer

(1) Except when a party files a petition to transfer under (b), any party may send the Court of Appeal a letter supporting or opposing transfer within 10 days after a record on transfer is filed in that court. The letter must be served on all other parties.

(2) The letter must be double-spaced and must not exceed 1,400 words if produced on a computer or five pages if typewritten.

(e) Limitation of issues

(1) On or after ordering transfer, the Court of Appeal may specify the issues to be briefed and argued. Unless the court orders otherwise, the parties must limit their briefs and arguments to those issues and any issues fairly included in those issues.

(2) Notwithstanding an order specifying issues under (1), the court may, on reasonable notice, order oral argument on fewer or additional issues or on the entire case.

(f) Court of Appeal clerk's duties

(1) When a transfer order is filed, the clerk must promptly send a copy to the superior court clerk, the parties, and, in a criminal case, the Attorney General.

(2) With the copy of the transfer order sent to the parties and the Attorney General, the clerk must send notice of the time to serve and file any briefs ordered under rule ~~66~~ 8.764 and, if specified by the Court of Appeal, the issues to be briefed and argued.

(3) If the court denies transfer after certification or petition, the clerk must return the record on transfer and any exhibits to the superior court clerk and promptly send notice of the denial to the parties and, in a criminal case, the Attorney General.

(4) Failure to send any order or notice under this subdivision does not affect the jurisdiction of the Court of Appeal.

Rule 8.761. ~~65.~~ Record on transfer

(a) Contents

The record on transfer must contain:

(1) The original record on appeal prepared under rules 124-132 in a limited civil case or under rules 183-185 in a criminal case;

(2) Any briefs filed in the appellate division; and

(3) Any order or opinion of the appellate division.

(b) Clerks' duties

(1) The superior court clerk must promptly send the record on transfer to the Court of Appeal and notify the parties that the record was sent when:

(A) The appellate division certifies a case;

(B) The superior court clerk sends a copy of an appellate division opinion certified for publication to the Court of Appeal under rule 106;

(C) The superior court clerk receives a copy of a petition to transfer; or

(D) The superior court receives a request from the Court of Appeal for the record on transfer.

(2) The Court of Appeal clerk must promptly notify the parties when the record on transfer is filed.

Rule 8.764. ~~66.~~ Briefs

(a) Who may file

(1) After transfer, the parties may file briefs in the Court of Appeal only if ordered on a party's application or the court's own motion. The court must prescribe the briefing sequence in any briefing order.

(2) Instead of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related case.

(b) Time to file

(1) The opening brief must be served and filed within 20 days after entry of the briefing order.

(2) The responding brief must be served and filed within 20 days after the opening brief is filed.

(3) Any reply brief must be served and filed within 10 days after the responding brief is filed.

(c) Additional service requirements

(1) Any brief of a defendant in a criminal case must be served on the prosecuting attorney and the Attorney General.

(2) Every brief must show delivery of a copy to the appellate division from which the case was transferred.

(d) Form

No brief may exceed 5,600 words if produced on a computer or 20 pages if typewritten. In all other respects briefs must comply with rule ~~14~~ 8.204.

Rule 8.767. ~~67.~~ Proceedings in the appellate division after certification

When the appellate division certifies a case or the Court of Appeal orders transfer, further action by the appellate division is limited to preparing and sending the record until termination of the proceedings in the Court of Appeal.

Rule 8.770. ~~68.~~ Disposition of transferred case

(a) Decision on limited issues

The Court of Appeal may decide fewer than all the issues raised and may retransfer the case to the appellate division for decision on any remaining issues.

(b) Retransfer without decision

(1) The Court of Appeal may vacate a transfer order without decision and retransfer the case to the appellate division with or without directions to conduct further proceedings.

(2) If the appellate division pronounced judgment before transfer and the Court of Appeal directs no further proceedings, the judgment is final when the appellate division receives the order vacating transfer, and its clerk must promptly issue a remittitur.

Rule 8.773. ~~69.~~ Remittitur

(a) Court of Appeal remittitur

The Court of Appeal clerk must promptly issue a remittitur when a decision of the court is final. The clerk must address the remittitur to the appellate division and send that court two copies of the remittitur and two file-stamped copies of the Court of Appeal opinion or order.

(b) Appellate division remittitur

On receiving the Court of Appeal remittitur, the appellate division clerk must promptly issue a remittitur if there will be no further proceedings in that court.

(c) Documents to be returned

Each reviewing court clerk must return all original records, documents, and exhibits with the remittitur but need not return any certification, transcripts on appeal, briefs, or notice of appeal.

Division 2. Rules Relating to the Superior Court Appellate Division [Reserved]

(Reviser's note: Current rules 100–108 are being substantively revised. They will be circulated for comment in 2006 and will be incorporated into the reorganized rules effective January 1, 2007.)

Division 3. Trial of Small Claims Cases on Appeal

Rule 8.950. ~~151. Scope~~ Application

~~This chapter applies to appeals in small claims cases.~~ The rules in this division supplement article 7 of the Small Claims Act, Code of Civil Procedure sections 116.710 et seq., providing for new trials of small claims cases on appeal, and must be read in conjunction with that statute.

Rule 8.952. ~~156.~~ Definitions

The definitions in rule 1.6 apply to these rules ~~In this chapter,~~ unless the context or subject matter ~~otherwise~~ requires otherwise~~:~~. In addition, the following definitions apply to these rules:

(1) "Small claims court" means the trial court from which the appeal is taken.

(2) "Appeal" means a new trial before a different judge on all claims, whether or not appealed.

~~(2)~~(3) "Appellant" means the party appealing; "respondent" means the adverse party. "Plaintiff" and "defendant" refer to the parties as they were designated in the small claims court.

Rule 8.954. ~~152.~~ Filing ~~notice of~~ the appeal

(a) ~~Small claims case~~ Notice of appeal

To appeal from a judgment in a small claims case, an appellant must file a notice of appeal in the small claims court. ~~must be signed by~~ The appellant or ~~by~~ the appellant's attorney must sign the notice. ~~and~~ The notice is sufficient if it states in substance that the appellant appeals from a specified judgment or, in the case of a defaulting defendant, from the denial of a motion to vacate the judgment. A notice of appeal must be liberally construed ~~in favor of its sufficiency~~.

(b) Notification by clerk

(1) ~~When a notice of appeal is filed,~~ The clerk of the small claims court must promptly mail a notification of the filing of the notice of appeal to each other party at the party's last known address.

(2) The notification must state the number and title of the ~~action or proceeding~~ case and the date the notice of appeal was filed. If a party dies before the ~~court gives notice~~ clerk mails the notification, the mailing is a sufficient performance of the clerk's duty.

(3) ~~The~~ A failure of the clerk to give notice of the judgment or notification of the filing of the notice of appeal does not extend the time for filing the notice of appeal or affect the validity of the appeal.

(c) Premature notice of appeal

A notice of appeal filed ~~before entry of the judgment, but~~ after ~~its rendition,~~ judgment is rendered but before it is entered is valid and is ~~deemed to have been~~ treated as filed immediately after entry. A notice of appeal filed after the judge has announced an intended ruling but before ~~rendition of the~~ judgment is rendered~~, but after the judge has announced an intended ruling,~~ may, in the discretion of the reviewing court ~~for good cause~~, be treated as filed immediately after entry of the judgment.

(Reviser's note: The wording of this rule has been made consistent with rules 8.100 and 8.104. No substantive change is intended.)

Rule 8.957. ~~153.~~ Record on appeal

~~Upon~~ Within five days after the filing of the notice of appeal and the payment of any fees required by law, the clerk of the small claims court must ~~within five days~~ transmit the file and all related papers, including the notice of appeal, to the clerk of the court assigned to hear the appeal.

Rule 8.960. ~~154.~~ Continuances

For good cause, the court assigned to hear the appeal may continue the trial. A request for a continuance may be presented by one party or by stipulation. The court may grant a continuance not to exceed 30 days, but in a case of extreme hardship the court may grant a continuance exceeding 30 days.

Rule 8.963. ~~155.~~ Abandonment, dismissal, and judgment for failure to bring to trial

(a) Before ~~appeal~~ the record is filed

~~At any time~~ Before the ~~file~~ record has been transmitted to the court assigned to hear the appeal, the appellant may file in ~~the office of the clerk of~~ the small claims court ~~a~~ an ~~written~~ abandonment of the appeal~~, or the parties may file in that office~~ or a stipulation ~~for abandonment~~ to abandon the appeal. ~~The~~ Either filing ~~of either document~~ operates to dismiss the appeal and ~~to~~ return the case to the small claims court.

(b) After the record is filed

After the ~~file~~ record has been transmitted to the court assigned to hear the appeal, the ~~appeal may be dismissed by that~~ court may dismiss the appeal on the appellant's written request ~~of the appellant~~ or the parties' stipulation ~~of the parties~~ filed in ~~with the clerk of the~~ that court ~~assigned to hear the appeal~~.

(c) Dismissal or judgment by the court

(1) The court must dismiss the appeal ~~must be dismissed~~ if the case is not brought to trial within one year ~~from~~ after the date of filing the appeal. If a new trial is ordered, the court must dismiss the appeal ~~in the case must be dismissed~~ if the case is not brought to trial within one year ~~from~~ after the entry date ~~of entry~~ of the new trial order ~~for the new trial~~.

(2) Notwithstanding ~~the foregoing provisions~~ (1), the court must not order dismissal ~~must not be ordered~~ or enter judgment ~~entered~~ if there was in effect a written stipulation extending the time for ~~the~~ trial or ~~if~~ on a showing that the appellant ~~shows that he or she~~ exercised reasonable diligence to bring the case to trial.

(3) ~~In any event~~ Notwithstanding (1) and (2), the court must dismiss the appeal ~~must be dismissed~~ if the case is not brought to trial within three years after either the notice of appeal is filed or the most recent new trial order is entered in the court assigned to hear the appeal.

(d) Notification by clerk

~~When~~ If an appellant files an abandonment ~~of appeal~~, the clerk of the court in which ~~the abandonment~~ it is filed must immediately notify the adverse party ~~or parties~~ of the filing. The clerk of the court assigned to hear the appeal must immediately notify the parties of any order of dismissal or ~~of~~ any judgment for defendant made by the court under (c).

(e) Return of papers

~~Upon dismissal of~~ If an appeal is dismissed, the clerk of the court assigned to hear the appeal must promptly transmit to the small claims court a copy of the dismissal order ~~of dismissal~~ and all original papers and exhibits ~~transmitted~~ sent to the court assigned to hear the appeal. ~~Thereafter~~ The small claims court ~~will~~ must then proceed with the case as if no appeal had been taken.

(f) Approval of compromise

~~Whenever the guardian of a minor or of an insane or incompetent person~~ If a guardian or conservator seeks approval of a proposed compromise of ~~a case on~~ a pending appeal in which a new trial has been ordered, the court assigned to hear the appeal may, before ruling on the compromise, hear and determine whether the proposed compromise is for the best interest of the ward or conservatee.

(Reviser's note: The wording of this rule has been made consistent with rule 8.244. No substantive change is intended.)

Rule 8.966. ~~157.~~ Examination of witnesses

The court may allow parties or attorneys representing parties to the appeal to conduct direct and cross-examination, subject to the court's discretion to control the manner, mode, and duration of examination in keeping with informality and the circumstances.

Division 4. Publication of Appellate Opinions

Rule 8.970. Authority

The rules governing the publication of appellate opinions are adopted by the Supreme Court and published in the California Rules of Court at the direction of the Judicial Council.

Rule 8.975. ~~976.~~ Publication of appellate opinions

(a) Supreme Court

All opinions of the Supreme Court are published in the Official Reports.

(b) Courts of Appeal and appellate divisions

Except as provided in (d), an opinion of a Court of Appeal or a superior court appellate division is published in the Official Reports if a majority of the rendering court certifies the opinion for publication before the decision is final in that court.

(c) Standards for certification

No opinion of a Court of Appeal or a superior court appellate division may be certified for publication in the Official Reports unless the opinion:

(1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

(2) Resolves or creates an apparent conflict in the law;

(3) Involves a legal issue of continuing public interest; or

(4) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

(d) Changes in publication status

(1) Unless otherwise ordered under (2), an opinion is no longer considered published if the Supreme Court grants review or the rendering court grants rehearing.

(2) The Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published. The Supreme Court may also order publication of an opinion, in whole or in part, at any time after granting review.

(e) Editing

(1) Computer versions of all opinions of the Supreme Court and Courts of Appeal must be provided to the Reporter of Decisions on the day of filing. Opinions of superior court appellate divisions certified for publication must be provided as prescribed in rule 106.

(2) The Reporter of Decisions must edit opinions for publication as directed by the Supreme Court. The Reporter of Decisions must submit edited opinions to the courts for examination, correction, and approval before finalization for the Official Reports.

Rule 8.980. ~~976.1.~~ Partial publication

(a) Order for partial publication

A majority of the rendering court may certify for publication any part of an opinion meeting a standard for publication under rule ~~976~~ 8.975.

(b) Opinion contents

The published part of the opinion must specify the part or parts not certified for publication. All material, factual and legal, including the disposition, that aids in the application or interpretation of the published part must be published.

(c) Construction

For purposes of rules ~~976~~ 8.975, ~~977~~ 8.985, and ~~978~~ 8.990, the published part of the opinion is treated as a published opinion and the unpublished part as an unpublished opinion.

Rule 8.985. ~~977.~~ Citation of opinions

(a) Unpublished opinion

Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

(b) Exceptions

An unpublished opinion may be cited or relied on:

(1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel, or

(2) When the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

(c) Citation procedure

A copy of an opinion citable under (b) or of a cited opinion of any court that is available only in a computer-based source of decisional law must be furnished to

the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable time in advance of citation.

(d) When a published opinion may be cited

A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.

~~**Advisory Committee Comment (2005)**~~

~~A footnote to the published version of former rule 977(d) stated that a citation to an opinion ordered published by the Supreme Court after grant of review should include a reference to the grant of review and to any subsequent Supreme Court action in the case. Revised rule 977 deletes this footnote because it is not part of the rule itself and the event it describes rarely occurs in practice.~~

Rule 8.990. ~~978.~~ Requesting publication of unpublished opinions

(a) Request

(1) Any person may request that an unpublished opinion be ordered published.

(2) The request must be made by a letter to the court that rendered the opinion, concisely stating the person's interest and the reason why the opinion meets a standard for publication.

(3) The request must be delivered to the rendering court within 20 days after the opinion is filed.

(4) The request must be served on all parties.

(b) Action by rendering court

(1) If the rendering court does not or cannot grant the request before the decision is final in that court, it must forward the request to the Supreme Court with a copy of its opinion, its recommendation for disposition, and a brief statement of its reasons. The rendering court must forward these materials within 15 days after the decision is final in that court.

(2) The rendering court must also send a copy of its recommendation and reasons to all parties and any person who requested publication.

(c) Action by Supreme Court

The Supreme Court may order the opinion published or deny the request. The court must send notice of its action to the rendering court, all parties, and any person who requested publication.

(d) Effect of Supreme Court order to publish

A Supreme Court order to publish is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion.

~~**Advisory Committee Comment (2005)**~~

~~**Subdivision (a).** Former rule 978(a) required generally that a publication request be made "promptly," but in practice the term proved so vague that requests were often made after the Court of Appeal had lost jurisdiction. To assist persons intending to request publication and to give the Court of Appeal adequate time to act, revised rule 978(a)(3) specifies that the request must be made within 20 days after the opinion is filed. The change is substantive.~~

~~**Subdivision (b).** Former rule 978(a) did not specify the time within which the Court of Appeal was required to forward to the Supreme Court a publication request that it had not or could not have granted. In practice, however, it was not uncommon for the court to forward such a request after the Supreme Court had denied a petition for review in the same case or, if there was no such petition, had lost jurisdiction to grant review on its own motion. To assist the Supreme Court in timely processing publication requests, therefore, revised rule 978(b)(1) requires the Court of Appeal to forward the request within 15 days after the decision is final in that court. The change is substantive.~~

Rule 8.995. ~~979.~~ Requesting depublication of published opinions

(a) Request

(1) Any person may request the Supreme Court to order that an opinion certified for publication not be published.

(2) The request must not be made as part of a petition for review, but by a separate letter to the Supreme Court not exceeding 10 pages.

(3) The request must concisely state the person's interest and the reason why the opinion should not be published.

(4) The request must be delivered to the Supreme Court within 30 days after the decision is final in the Court of Appeal.

(5) The request must be served on the rendering court and all parties.

(b) Response

(1) Within 10 days after the Supreme Court receives a request under (a), the rendering court or any person may submit a response supporting or opposing the request. A response submitted by anyone other than the rendering court must state the person's interest.

(2) A response must not exceed 10 pages and must be served on the rendering court, all parties, and any person who requested depublication.

(c) Action by Supreme Court

(1) The Supreme Court may order the opinion depublished or deny the request. It must send notice of its action to the rendering court, all parties, and any person who requested depublication.

(2) The Supreme Court may order an opinion depublished on its own motion, notifying the rendering court of its action.

(d) Effect of Supreme Court order to depublish

A Supreme Court order to depublish is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion.

~~**Advisory Committee Comment (2005)**~~

~~**Subdivision (b).** Former rule 979(a) required depublication requests to be made "by letter to the Supreme Court," but in practice many were incorporated in petitions for review. To clarify and emphasize the requirement, revised rule 979(a)(2) specifically states that the request "must not be made as part of a petition for review, but by a separate letter to the Supreme Court not exceeding 10 pages." The change is not substantive.~~

(Reviser's note: The following repealed rules are deleted from title 8.)

~~**Rule 40.2. Recycled paper**~~

~~When these rules require the use of recycled paper, the attorney, party, or other person serving or filing a document certifies, by that act, that the document was produced on recycled paper as defined by Public Resources Code section 42202.~~

~~**Advisory Committee Comment (2005)**~~

~~New rule 40.2 restates former rule 40(*l*).~~

(Reviser's note: Rule 40.2 is deleted because it duplicates rule 1.22.)

~~**Rule 51. Substitute trial judge**~~

~~**(a) Who may act**~~

~~If these rules require an act to be done by the judge who tried the case and that judge is unavailable or unable to act at the required time, the act may be done by another judge of the same court in counties with more than one judge.~~

~~**(b) Who must designate**~~

~~(1) The presiding judge—or, if none, the senior judge—must designate the judge to act under (a).~~

~~(2) If no judge of the superior court in the county is available, the Chair of the Judicial Council must designate a judge to do the act.~~

(Reviser's note: Rule 51 is deleted because it duplicates rule 6.603(c)(1)(E).)